# ADVERTISING

AND

# OTHER ADDRESSES

BY

FRANCIS BACON JAMES

Of the Cincinnati Bar; President of the Ohio State Board on Uniform State Laws; Chairman of the Committee on Commercial Law of the Commissioners on Uniform State Laws in National Conference.



1907
THE ROBERT CLARKE CO.
CINCINNATI

Published May 1, 1907

TO

GEORGE GUCKENBERGER

President of the Board of Trustees of the Cincinnati College of Finance Commerce and Accounts.

# Publishers' Preface

The publishers hold the copyright to this volume in trust for The Cincinnati College of Finance Commerce and Accounts to which institution the proceeds of its sale go to increase the endowment fund. The great cause of commercial education and the part Cincinnati is playing in the movement are set forth in the address on Advertising.

THE ROBERT CLARKE CO.

Cincinnati, May 1, 1907

# Contents

# Advertising as a Branch of Commercial Education.

(An address delivered at the third annual dinner of the Advertisers' Club of Cincinnati, Grand Hotel, Wednesday evening, January 16, 1907.)

*Mr. Toastmaster and Gentlemen—*

The systems of education now generally prevailing, were conceived in the past ages when the world's population was principally divided among the farmer, soldier and members of the so called learned professions. Sciences were looked upon as works of the Evil One and a knowledge of the classics, as the sole accomplishment of a gentleman. The people were plundered by the nobility; war was the occupation of nations; theology the chief subject of intellectual combat; industry and commerce tolerated vocations of a despised middle class; shop keeping, regarded as inherently degrading. Although plunder has given way to economic freedom; war to commercial treaties; theology bended its knee to science; and industry and commerce become the civilizers of the world, yet the main features of the old systems of education generally prevail despite the changed condi-

tions. The old systems of education alone are not adapted to meet the needs of a majority of the people or to fit them to wisely choose an occupation. The educational reformer, however, has been at work. Less than a century ago trade schools were established which quickly spread throughout Europe. Technical education has been evolved within the last forty years and free technical schools have only become known in the United States within twenty-five years. With the hundreds of thousands of primary schools, but thirty-seven had courses in manual training in 1890. In 1903 this number had grown to three hundred and twenty-two, an increase of nine hundred per cent in thirteen years. In 1894 there were but fifteen high schools in the United States maintaining courses in technical education. In 1903 this number had grown to ninety-five, an increase of six hundred per cent in nine years.

The Ohio Mechanics Institute was founded in 1827 and within the last few years has done splendid work. The Cincinnati Technical School was established in 1886 and is now affiliated with the Cincinnati University. Both of these, however, are pay schools. Prior to September 1, 1905, Cincinnati had no free schools giving any branch of technical education. In the fall of 1905, five

manual training centers were established for the intermediate schools. By September, 1906, this number had grown to nineteen, an increase of three hundred per cent in one year. A new high school will soon be erected and additions made to Walnut Hills and Woodward High Schools and courses in industrial and commercial education will soon be given in all three high schools of this city.

Hungary in 1830, Switzerland in 1833 and Austria in 1848 established commercial schools. In the little republic of Switzerland today there are sixteen day schools of commerce and fifty-eight evening schools of commerce. Neufchatel, Switzerland, a town of twenty thousand inhabitants, in 1883 built one of the handsomest schools of commerce in the world and it now has an attendance of six hundred pupils. Commercial educational courses are gradually finding their places among the regular courses of instruction in the high schools of this country.

Germany, however, has shown the greatest strides in industrial and commercial education. Commercial education was practically unknown in Germany in 1880. That nation, with its tremendous progress in industrial education, has only taken up this most important subject of commercial education within the past twenty-five years. In the Ger-

man Empire commercial schools are classified as follows: (1) Commercial Schools (handels-schülen), corresponding to our high school; (2) Advanced Commercial Schools (höhere-handels-schülen); (3) Commercial Continuation Schools—night schools; (4) Commercial High Schools (handels-hoch-schülen), corresponding to a college or department of a university.

The German Commercial Continuation Schools or night schools have had a marvelous growth. In 1902 there were two hundred and forty-four in the Kingdom of Prussia with twenty-three thousand and thirty-seven pupils; twenty in Bavaria; forty-seven in Saxony with forty-seven hundred and forty-four pupils, and twenty-three in Baden, with twenty-six hundred pupils. But eight years ago a commercial school of a grade above a high school was unknown in Germany. The honor of establishing the first commercial college in the world—a school above the grade of a high school—rests with Antwerp, Belgium, which established such an institution in 1852. In 1898 such schools were established in Leipzig, Frankfort and Aix LaChapelle; in Cologne in 1901 and in Berlin in 1905, making but five of such colleges in the German Empire. The German Commercial Colleges are modeled on the Antwerp College. The first commercial school

in America of a grade of a college or university was established in Philadelphia in 1881 by Mr. Joseph Wharton who endowed the Wharton School of Finance and Commerce which became a department of the University of Pennsylvania. In 1898 the Universities of California and Illinois added departments of Commerce and Finance. The New York University School of Commerce, Accounts and Finance was also established. The Wharton and New York schools have added night classes. A few other universities have also established courses which will ultimately ripen into departments of Finance, Commerce and Accounts.

A college of finance, commerce and accounts is not what is popularly known as a business college. The object of such is not to teach boys, but young men, who desire to pursue a commercial career, and to educate men who have already entered upon commercial life but desire to perfect themselves in higher commercial branches. The American public is deeply indebted to The American Bankers' Association for its educational work in enlightening the public upon the great subject of commercial education. It established the American Institute of Bank Clerks for the purpose of educating young bankers in higher finance and banking. The Cincinnati Chapter of Bank Clerks has been one of the

most enthusiastic branches of this splendid organization. This Chapter began the agitation for the establishment of the Cincinnati College of Finance, Commerce and Accounts. On the second day of October, 1906, a number of influential bankers and business men incorporated the Cincinnati College of Finance, Commerce and Accounts. Within one week after its incorporation about one hundred and twenty-five students were enrolled, of which number about one-third were employees of banks and two-thirds drawn from all avenues of commerce and trade. In this school at the present time but four courses of instruction are given and only night sessions maintained. The public is hardly familiar as yet with the important work being done by this school.

It is desirable during the coming year to add additional courses, particularly a course on journalism, with one on the law of libel and slander and another on copyright as bearing thereon; a course on real estate; a course on salesmanship and a course on the law of sales as an aid thereto; a course on advertising, with a course on the law of trade-marks and trade names and fair and unfair competition in trade as allied thereto. Two questions are presented: Should a course in advertising be established? and how should such a course

be maintained? A consideration of these questions will necessarily involve a brief discussion of the nature of advertising and whether it can be reduced to a science and treated as a branch of higher commercial education.

The discovery of the art of printing from movable types by Gutenberg in 1438; the invention of the cylinder press and the application of steam thereto four centuries later by Hoe; the utilization by Morse of electricity for conveying news; the establishment of freedom of speech and the press and the reduction in the price of paper by the discovery of wood pulp, all combined to make the modern press a possibility and to make advertising one of the greatest engines of commerce. Not until the time of the Civil War did the press mean a newspaper in the sense of carrying the news of the day, and when it became a medium of daily news, then advertising was born in the modern understanding of the word.

Advertising matter is merely news about things for sale, for the purpose of giving publicity to the qualities of an article offered. Advertising, therefore, in its true sense, is a branch of salesmanship. A salesman is one who is able to impress a customer with the qualities of the goods he has for sale. Advertising does not consist merely of so

much paper and printer's ink, but of the trained mind which is able to put into attractive and convincing form the news about articles to be marketed. Advertising is the power by which the salesman creates a demand in the minds of the public for articles offered for sale.

Advertising, when properly analyzed, is not a simple but a complex business proposition.

Advertising must be considered from five points of view: industrial, legal, ethical, commercial and economical.

From the industrial point of view the goods must be of such uniform quality that when a person has been induced by an advertisement to purchase, he will continue purchasing with the expectation of getting the same article. This deals with production.

In the next place, the goods should be given a trade name and always dressed up in the same manner so as to catch the eye, impress the memory and recall the quality of the goods to the consumer. In other words, a good valid, legal trademark for the goods and a novel package should be selected. This is legal. Much ignorance exists on this subject and every thoughtful producer, salesman and advertiser should have a good general knowledge of the law of trade-marks and trade names and fair

and unfair competition in trade. The selection for an article of a name and package incapable of exclusive appropriation, have caused the waste of thousands of dollars in advertising and expensive and unsuccessful litigation.

An advertisement must truthfully state the quality of the goods so that a purchaser will feel inclined to buy the goods again because they are up to the sample as furnished by the first purchase. This is the ethics of advertising.

The advertisement should convey general news as to where the article may be obtained, how it can be used and some indication of its cost as compared with other articles. This is commercial.

The cost of advertising should bear some proportion to the returns from sales. While it may cost a large sum to sell the first article, the average cost of advertising each article sold should be small. This is the economical question involved.

Advertising can also be considered from the standpoint of the manufacturer, retailer and the mail order man. Each is a class by itself.

The manufacturer advertises either to directly or indirectly sell his goods. If the manufacturer desires merely to market his goods to a wholesaler, jobber or retailer, he probably reaches them merely through a trade journal. The manufacturer, how-

ever, may desire to create a demand for his goods by the consumer from the retailer indirectly or directly from himself without a middleman, in which cases his advertisement is of an entirely different character and of the highest order. All the five aspects of advertising must, in such case, be carefully considered. Good goods, with a well chosen name, packages put up in attractive form, and truthful statements are the most important elements. In this character of advertising his purpose may be twofold. One, to compete with other articles of like character, and the other to create an entirely new demand from those who have not heretofore been consumers. This character of advertising may well be illustrated by such a well known remedy as Listerine, by such a well known soap as Ivory, and by such a well known article as Elastic bookcases and other office fixtures. The illustrations might be multiplied indefinitely.

The retailer's problem of advertising is very different from the general advertising of the manufacturer. His object is to convey to the public an immense amount of information as to the virtues of numerous articles and convince the public that they will obtain full money's worth. The retailers are likewise classified into many kinds, the most important being the department store. Many forms

of advertising are used, the most popular being the personal confidential style so long and so successfully used by John Wanamaker.

Mail order advertising partakes largely of the character of that of the retailer. A tremendous field is open for enterprising citizens of Cincinnati to build up a great mail order business. The City of Chicago maintains three establishments catering to millions of people. Cincinnati is in the center of one of the most fertile and prosperous regions in the world and her merchants could sell millions of dollars of goods annually to millions of people if merely brought to their attention.

Advertising is either competitive or constructive. Competitive advertising is that kind in which one tries to outsell another in the same articles. Constructive advertising is of the highest importance not only to the advertiser but to the community. There are many useful things produced whose virtues and qualities are known to but a small percentage of the people. This class of advertising seeks truly to convey news to the public as to these articles and creates a demand—construct a business—while not competing directly with articles of the same kind. This is easily illustrated locally by taking the fuel consumed in Cincinnati and the use of gas for cooking purposes. It does not even

diminish the consumption of fuel because the coal, instead of being burned in each house, is burned at a central station by the Cincinnati Gas and Electric Company. The expression "Cook with Gas; Light with Electricity" has become a household one. This is truly constructive advertising.

Advertising can be again divided into public, quasi-public and private. Public advertising is setting forth to capital as well as labor the trade advantage of a municipality. If I were Mayor of Cincinnati, I would strongly advocate and urge Council to set aside an appropriation of at least one hundred thousand dollars a year to advertise the industrial and commercial advantages of Cincinnati. If the municipal code were not elastic enough to enable Council to act, I would call on every business organization, the Industrial Bureau and the Associated Organizations to aid in getting legislation for that purpose. Quasi-public advertising is that by theaters and churches; gas, telephone, steam railroad and interurban companies. Private advertising is that of industrial and commercial establishments.

Advertising can again be divided into domestic and foreign. Domestic advertising reaches the home markets for home products. In whichever market the salesman desires to market his goods, he

should adapt himself, so far as possible, to the prejudices of the people and their usages and customs, their needs, wants and means. In advertising goods in foreign markets the advertiser should carefully study local conditions. This was illustrated by the business career of Mr. Joseph Chamberlain, the greatest English example of the business man as a statesman. It is related of him that after he had secured a monopoly of the English markets in gimlet pointed screws he desired to extend his trade to foreign countries. He marketed his goods in foreign countries in packages put up in the same style in which they were marketed in England. He failed absolutely to sell his screws. He then put up his packages with labels of a kind to which the foreigners were accustomed and he soon established an immense foreign trade. Of the fifteen billions of dollars of goods manufactured in the United States, but six hundred millions are exported; in other words but about four per cent. The most important direction in which Americans can turn their faces is toward foreign markets and there is no better way of acquiring foreign markets than by judicious advertising after careful study of local conditions.

The mediums of advertising can be classified into public and private. Public mediums of advertising

would be publicity given through newspapers, trade journals, magazines, window cards, show cards, posters, bill boards, advertising signs, electric signs, street cars, railway stations, steam boats and wharf boats; private mediums of advertising are house, organs, bulletins, catalogues, price lists, postal cards, mailing lists, samples and prizes. Each of these should be carefully studied as to its adaptability to advertising the particular article. Six hundred millions of dollars a year are spent in advertising. A billion dollars a year could easily be used for this purpose and if spent scientifically would yield one hundred times the returns now realized from the six hundred millions of dollars.

The profession of advertising is divided into advertising experts, agencies, managers and solicitors. Each plays an important part in the great work.

The advertising expert has become a species of business counsellor who consults with the men in charge of the sale of goods of many large houses.

The advertising agency is useful as a central place through which to make advertising contracts.

The advertising manager of a large manufacturing establishment is like the brigadier general of an army assisted by a corps of able writers as captains. He himself must be a well trained salesman because selling and advertising are twin brothers.

The advertising solicitor should be a man skilled in the art of advertising. He should do in part the work of the advertising expert, because if he be skilled in the art he can materially increase the space sold in any paper or magazine he may represent.

The man who is about to make a profession of advertising should have technical knowledge of the business he represents and of the technical features of the art of the printer.

The successful advertiser should also have an artistic sense. News today is conveyed as much by pictorial representations as by words. A study of the fine arts will therefore largely contribute to the success of the advertiser.

In conclusion, to be successful as an advertiser, a man must be a good salesman; know human nature; know the business he is advertising; know the quality of the goods he is selling; know how to tell the truth; knowing how to tell the truth, actually tell the truth; know how to tell the truth persuasively; know the needs of the people to whom the advertisement is addressed; know the mediums through which advertising matter is usually conveyed; know the cost of advertising; know the value of a trade-name, and have a technical knowl-

edge of printing and press work and an appreciation of the fine arts.

Who can gainsay that advertising is sufficiently developed to be regarded as a profession and capable of scientific treatment? If it is capable of scientific treatment it can be improved by a course of instruction. It would therefore seem to be wise to establish a chair of advertising in the new Cincinnati College of Finance, Commerce and Accounts where advertising could be treated scientifically.

How can such a course be established? The Cincinnati College of Finance, Commerce and Accounts is maintained by a small endowment of a number of prominent bankers and business men. Following the example set by the German Colleges of Commerce nearly all the faculty are men actively engaged in the affairs of life and give their services without charge in furtherance of the great cause of higher commercial education. It is of the highest importance to the business men of the city, as well as the newspapers, that this work should be carried on. The College wants at least one representative of the Advertisers Club upon its Board of Directors and one or more representatives as members of the faculty.

Advertising is as important to commerce as capi-

tal and labor. A father sent his three sons into the world to seek their fortunes. When years had elapsed they met in a far off land thousands of miles from their old home. One said he had discovered a medicine which would cure any disease; another that he had found a carpet upon which, if one stood and wished, it would carry him whereever he pleased; the third, that he had discovered a glass by which he could see any object in the world. The one with the glass raised it and saw his father in a dying condition. The three brothers stood on the carpet and they were carried immediately to the sick father. The medicine was administered and the father was instantly cured. They fell to disputing among themselves as to who had saved the father. The wise old man said three things saved him; the glass that had discovered him, the carpet that had carried them to him, and the medicine that had cured him, and without all three he would have died.

So it is with advertising. Capital alone is not the cause of the commercial supremacy of our country; labor alone has not caused it; labor and capital together have not caused it; but the commercial greatness of our country is due to three great factors, capital, labor and advertising.

# Practical Suggestions on Codifying the Law of Warehouse Receipts.

(An address delivered before the American Warehousemen's Association, at the New Willard Hotel, Washington, D. C., December 8, 1904.)

*Mr. President and Gentlemen—*

Of one hundred and sixty national commercial organizations in the United States, the American Bankers' Association and the American Warehousemen's Association have manifested the deepest interest and co-operation in improving the commercial law and making it uniform. It will be superfluous to discuss the wisdom of and necessity for codifying the law of warehouse receipts and making that law uniform throughout the United States, because the American Warehousemen's Association has already placed itself on record on these questions and appropriated fifteen hundred dollars and The Conference of Commissioners on Uniform State Laws has employed Mr. Barry Mohun of the Washington bar and Professor Samuel Williston of Harvard Law School to do the work. It remains to make a few practical suggestions on framing and perfecting this code.

The proposed code governing warehouse receipts is a commercial code and therefore ought to be based on the mercantile rather than the legal view, where a conflict exists. A brief sketch of the growth of mercantile law may aid in a solution of this question. England, from whom we derive our traditions, is and always has been a commercial nation. King Alfred, who reigned at the end of the ninth century, passed laws permitting foreign merchants to visit his kingdom for purposes of trade during the great fairs. The Norman Kings made unfulfilled promises to their subjects that King Edward's Code of Saxon law should receive the royal sanction, and about the year eleven hundred Henry the First granted a charter of liberties. On June 15, 1215, King John signed Magna Charta, which guaranteed a right to international trade as follows: "All merchants shall have safety and security in coming into England, and going out of England, and in staying and traveling through England, as well by land as by water, to buy and sell, without any unjust exactions, *according to ancient and right customs.*" To the consistent fulfilment of this declaration, England owes her commercial supremacy for seven hundred years. The foreign merchants added to these "ancient and right customs" commercial usages of the continent on many

subjects. The merchants at each great fair instituted a Court Pepoudrous, or Dusty-foot Court, so called, because disputes were there settled as quickly as "the dust fell from the feet," and there administered justice according to these customs. By the beginning of the seventeenth century the custom of merchants was admitted as evidence in the courts in cases of trade contracts, and by the middle of the eighteenth century business had so increased that the usages of merchants were recognized in courts as part of the common law. The struggle was a long one; foreign bills of exchange first received judicial sanction; domestic bills next fell under judicial sway, but promissory notes were slow to find a place in the law. Lord Chief Justice Holt, in the year seventeen hundred and three, ruled in the case of *Clerke* v. *Martin*[1] that a promissory note was not negotiable, and declared that the merchants were endeavoring to set the law of Lombard Street above the law of Westminster Hall. The merchants, however, successfully appealed to Parliament, and Lombard Street did make law for Westminster Hall. This act was passed in the year seventeen hundred and four, and is known as the statute of 3 and 4 Anne, chapter nine, and has been re-enacted in most of the American States.

[1] 2 Raym. Ld., 757.

Mercantile usages as to checks, bonds, certificates of stock, scrip, warehouse receipts and bills of lading have found judicial recognition. Mercantile usages as to the relation of partners, principal and agent, bailor and bailee and other commercial transactions have also received judicial approval.

Many judges of many courts have at times refused to recognize mercantile usages in their purity, and declined to give them full force. The Supreme Court of Massachusetts, on the third day of April, 1883, in the case of *Hallgarten* v. *Oldham*,[2] declared that a warehouse receipt issued by the owner of a private warehouse to a third person by name and not to his order and by him assigned did not transfer title. Mr. Justice Oliver Wendell Holmes, in deciding that case said: "The appeal to commercial usage cannot help the plaintiff's case. If there be any usage to treat such documents as this as symbols of property in the sense of the argument of the plaintiffs, it is simply a usage to disregard well settled rules of law affecting the rights of third persons."

The merchants gave to the law their customs and usages. The courts have been slow, at times, to give these customs and usages the full force of law. Now, however, that our legislative bodies are to give back to the merchants codes of mercantile

[2]135 Mass., 1.

law, these codes should so far as possible embody these customs and usages, freed from legal jargon and unhampered by mere legal rules except such as are based on ethical principles underlying all American Jurisprudence, and principles of economics underlying sound and sane commerce.

In 1775, and repeated in 1793 in the celebrated case of *Waugh* v. *Carver,*[3] the English courts held that the mere receipt of a percentage of profits made one a partner, and this remained the law of England until overthrown by the House of Lords in 1863. For a period of eighty-three years English lawyers evaded the effect of this decision by providing not for a receipt of a percentage of the profits but for a receipt of an amount equal to a percentage of the profits. This was mere legal jargon.

A mercantile code should be a clear expression of well recognized commercial customs whether they have or have not yet found their place in judicial decisions. The merchants gave to the law their customs and the law should give their customs back to them clearly expressed and freed from mere technical expressions. Whenever there is a conflict between mercantile usages and legal expressions, legal expressions should give way to mercantile usages embodied as rules of law.

[3] 2 H. Bl., 235.

Sir Courtney Ilbert in his work on "Legislative Methods" (at page 247) gives the following excellent advice: "The language of a Bill should be precise, but not too technical. An Act of Parliament has to be interpreted, in cases of difficulty, by legal experts, but it must be passed by laymen, be administered by laymen, and operates on laymen. Therefore it should be expressed in language intelligible to the lay folk. In some cases the compromise between popular and technical language may be effected by means of a definition. But definitions are dangerous and should be sparingly used."

A commercial code should consist in part of a statement of general principles governing usual cases which arise in practice. The great object of a code is certainty. The most bitter opponents of codification concede that mercantile law should be codified for the sake of certainty of the rule. Therefore, a code should not consist of a mere statement of general principles leaving its application entirely in the discretion of a judge. The French Codes, for this reason, are not models to be followed. Nor on the other hand should a code refine too much. A code should consist of a statement of the general rules of law applicable to general business transactions and exceptions to the

rules applicable to the usual exceptional cases. To sum up: the collocations of facts which arise in mercantile transactions should be provided for. The code should be based upon judicial decisions, judicially recognized customs and customs recognized by the mercantile community. Where judicial decisions conflict with well recognized, economically and ethically sound customs, the mercantile customs should be embodied in the code in preference to the formal technical rules.

A code should be so framed as not to check the growth of new mercantile customs. While a code should contain general rules and well defined exceptions it should be framed so as to allow new mercantile usages to grow. As said by Sir Frederick Pollock in his lectures on the Expansion of the Common Law, delivered on the occasion of his recent visit to America in 1903: "It is important to observe that the Law Merchant was not incorporated into our systems, as some have contended, as a fixed body of rules incapable of addition. It is still in fact *a living body of customs* and English decisions have quite lately recognized this fact."

A code must be framed so that there will be uniformity of decision not only in interpreting its provisions but in laying down rules governing transactions not covered by it. The great object

in preparing a code is to produce a uniform law throughout the United States by having each state adopt the same code.

It is universally recognized that there is no common law of the United States. It is true that a Federal Court obtaining jurisdiction by reason of diversity of citizenship will use its independent judgment in determining what is the law of the state. This was elucidated by Mr. Justice Story, when he said in 1842 in the case of *Swift* v. *Tyson,*[4] "The law respecting negotiable instruments may be truly declared, in the language of Cicero, adopted by Lord Mansfield in *Luke* v. *Lyde,* 2 Burr. 883, 887, to be in a great measure, not the law of a single country only, but of the commercial world." But this very doctrine has resulted in increasing lack of uniformity. On subjects as to which Congress has jurisdiction, such as interstate commerce, there may be unity of law. As to general commercial subjects there cannot be unity of law but there may and ought to be uniformity. The object of framing a code and having it adopted in each state may fail in part unless clauses can be framed which will bring about uniformity not only in the interpretation and construction of the code itself, but in applying rules of law to cases

[4] 16 Pet., 1, 19.

not covered by the code and applying mercantile usages which may arise after its adoption.

The English Bills of Exchange Act, passed August 18, 1882, provides (section 97) that:

"The rules of common law including the Law Merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to Bills of Exchange, promissory notes and checks."

The Negotiable Instruments Code prepared by the Conference of Commissioners on Uniform State Laws and now adopted in twenty-five states and territories, provides (section 7) that:

"In any case not provided for in this Act the rules of the Law Merchant shall govern."

The English Sales Code, passed February 30, 1894, provides (section 61) that:

"The rules of common law, including the Law Merchant, save in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake, or other invalidating cause shall continue to apply to contracts for the sale of goods."

In the draft of a Sale Code prepared by Professor Samuel Williston for the Conference of

Commissioners, the same provision (and numbered as section 60) is found.

This section received much discussion at the meeting of the Conference of Commissioners in September of the present year at St. Louis. Professor Williston was instructed to carefully reconsider it.

The Secretary of the American Bar Association, who has in his hands the manuscript of the proceedings of the Conference of Commissioners on Uniform State Laws, held in September at St. Louis, furnishes the information that Professor Williston has redrafted this clause (as section 60) so as to read as follows:

"(1) In any case not provided for in this Act, the rules of the common law, including the Law Merchant, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, bankruptcy or other invalidating cause, shall continue to apply to contracts for the sale of goods.

"(2) This Act shall be so interpreted, if possible, to effectuate its general purposes to make uniform the law of those states which enact it. Its interpretation shall not be aided by a consideration of peculiar rules of law prevailing in this state."

In the English Partnership Act, passed August 14, 1890, it is provided (section 46) that:

"The rules of equity and of common law applicable to partnerships shall continue in force except in so far as they are inconsistent with the express provisions of this Act."

Professor James Barr Ames, Dean of the Harvard Law School, is now preparing an American Code governing partnerships. As he is a member of the Conference of Commissioners on Uniform State Laws and attended its last session, his forthcoming code will probably contain valuable suggestions on this subject.

Mr. R. Floyd Clarke of the New York Bar, author of The Science of Law and Law Making, one of the most vigorous opponents of general codification, but who concedes that commercial law should be codified, has made a suggestion that each code should contain the following clause:

"The foregoing rule shall apply except in cases where the special facts of the case presented shall in the opinion of the court produce a result so inequitable as to require the establishment of an exception, and in ascertaining the application of the rule or the exception, the court shall be at liberty to follow out the reason of the rule and

the reason for the exception on the lines of cases heretofore decided in common law."

The language contained in the English Bills of Exchange Act, Sale Code, and Partnership Act would not be wise in an American Code because the English Codes are applicable to a country in which there is but one court of last resort. In America, the Supreme Court of each state finally determines the law of that state and in addition, the Federal Courts determine for themselves the law in each state.

The rule laid down by the American Negotiable Instrument Code that "in any case not provided for in this Act, the rules of the Law Merchant shall govern," is best fitted for an American Commercial Code. However, it probably does not go far enough. If the courts of a state are called on to determine what are the rules of the Law Merchant, possibly a conflict will be found. It might therefore be wise to add an additional rule that in determining what are the rules of the Law Merchant, the law laid down by the Supreme Court of the United States shall govern; that if there be no decision of the Supreme Court, the rules laid down by the United States Circuit Court of Appeals shall govern; that in the absence of both, the well recognized customs of merchants, if ethic-

ally and economically sound, shall govern even if they are contrary to the rules adopted by the state courts.

Can the law of warehouse receipts be codified? The argument has been made that the law of Warehousemen cannot be codified by reason of the great diversity of the business. While it might be difficult to codify the whole body of the law of Warehousemen, such a task is not impossible. When the law of Negotiable Instruments was codified, no attempt was made to codify the whole law of Banks and Banking, although that task was not insuperable. The experts who have been appointed are not to undertake to codify the whole law of Warehousemen, but to codify the law of warehouse receipts. When the law of Negotiable Instruments was codified it was divided into several parts. The first dealt with all negotiable instruments. Then rules were laid down which were peculiarly applicable to bills of exchange; another part dealt with rules peculiarly applicable to promissory notes; and then rules peculiarly applicable to checks. The same system of classification can be readily followed by the experts in preparing a code governing warehouse receipts. In the first place, rules can be stated applicable to all warehouse receipts. Then separate rules can be given applicable to

warehouse receipts of a particular character, or pertaining to a particular kind or class of commodities.

The work assigned the experts is a stupendous one. They have not the example of any previous code upon the same subject. The text books discussing the subject are not of the highest type of scholarship. The statutes are many and diversified. The judicial decisions are numerous and conflicting. There are many customs and usages which have not yet been embodied in judicial decisions. The work should be prepared with the greatest care and thrown open to the public for criticism and discussion. The admonition of Mr. Charles McKeehan of the Philadelphia bar in summing up the controversy over the Negotiable Instruments Code is worthy of consideration. He said:

"Finally, the whole controversy should serve as a useful lesson to those who will in future direct the preparation of statutes codifying other branches of the law in this country. The Negotiable Instruments Law was originally drafted with the greatest care by a learned expert. It was then revised by a sub-committee of the Commissioners on Uniform State Laws, and was then revised by the Commissioners themselves at their annual conference. In addition to this, the statute, prior to

its adoption by the conference, had been brought to the attention of a number of experts generally throughout the country, and had received at least some consideration at their hands. Moreover, all who shared in the preparation of the act enjoyed the very great advantage of having before their eyes the English Bills of Exchange Act, which offered suggestions on every important point; afforded a constant opportunity for useful comparison, whose provisions moreover could be examined in the light of twenty years' experience. In spite of all this, some errors (precisely how serious no one can say as yet) crept into the Negotiable Instruments Law which might have been avoided had the act, prior to its final revision, been subjected for several years to the most searching criticism obtained by giving to it the widest publicity and by soliciting the active co-operation of the considerable number of men whose thorough knowledge of the law of negotiable paper, whether from the standpoint of the banker, the practitioner or the student, had fitted them to render valuable assistance in the preparation of a code on that subject. The two or three additional years consumed by pursuing this method would have yielded an ample return, and those who would object to the labor, expense and time required by this method little

appreciate the gravity and difficulty of the task of embodying the law in a series of authoritative abstract propositions. Many will regard the shortcomings of the Negotiable Instruments Law as not very serious, but all may well remember that these shortcomings (such as they are) can probably be ascribed to the lack of adequate criticism."

The Conference of Commissioners on Uniform State Laws should be provided not only with money with which to pay experts, but also funds with which to have printing done for a wide distribution of the proposed code, thoroughly annotated, with references to the source of each provision and detailed explanations. The code should be sent throughout the country to all warehousemen, and experts on this branch of the law and business. All criticisms should be compiled and reported to the Conference of Commissioners. The code and the criticism should be fully discussed by the Conference and the discussions printed and distributed. At least a year should be taken for their careful reconsideration. This work requires money and the Conference of Commissioners' sources of revenue are limited. Will it not be wise for the American Warehousemen's Association to make provision that the Conference may not be hampered by lack of funds in its work?

# Physical Culture an Essential Branch of Education.

(An address delivered at the Silver Jubilee Dinner of the North Cincinnati Turnverein, Saturday, June 16, 1906.)

*Mr. Toastmaster, Ladies and Gentlemen—*

When the American colonies had won the battle for religious and political freedom, the sovereign American States ceded to Congress a vast empire west of the Alleghenies; and when Congress, in 1787, came to ordain a government for the great wilderness northwest of the Ohio river, it recognized the true foundation of human progress by proclaiming that:

"Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."

While education thus became the rudder of the new political craft, the world was still at sea with no bright pedagogical star to guide it to a wise educational system. A Herbert Spencer had not yet arisen to clearly classify the human activities or to point out that the object of education was to fit mankind to perform the activities of life by im-

parting useful information and disciplining the body and mind.

These now recognized self evident truths, at that day, had not yet dawned on mankind. As direct self preservation is necessary to human existence, a high degree of importance should be given to those branches of education which teach how to preserve life and health. The systems then and still much in vogue, were conceived in the past ages when it was thought sufficient that the masses should be taught reading, writing and arithmetic; and for those destined for the limited learned professions, to memorize Caesar, Horace and Virgil, and solve problems in algebra, geometry and trigonometry. Broad shoulders and an erect carriage were signs of ignorance; sallow cheeks the marks of literary genius. No courses of instruction found place in schools, to fit men and women to choose an industrial or commercial occupation or to pursue the practical affairs of life. It is true, that as time progressed, a few farseeing men, such as Benjamin Franklin and Thomas Jefferson, preached the wisdom of physical education. In 1818, Thomas Jefferson, in drafting a plan for the University of Virginia, laid stress on the necessity of a gymnasium in connection with every institution of learning. These philosophers and

statesmen were regarded as dreamers and theorists, far in advance of their times. The principle that healthy, well trained and disciplined bodies as well as minds, were more important to the mass of the people in fighting the battles of life, than a proficiency in the classics and the higher mathematics, has gradually dawned upon those who have been charged with the grave responsibility of educating youth.

It remained for Germany to formulate a correct system of physical instruction as a regular department of education. Schnepfenthal, near Gotha, in 1784, became "the cradle" and Frederick Ludwig Jahn the "Father of German Turning." Jahn is to be classed with Watt and Morse and Bell as a great inventor having done as much for mankind in inventing the parallel and horizontal bars, as they in inventing the steam engine and the telegraph and the telephone. All honor to Jahn, who has done as much by his teachings to improve mankind physically, intellectually and morally, as all who went before or who have come since.

Ling, the Swede, did much in the great cause, but the crowning work was done by Jahn.

The year 1842 is a milestone on the roadway of the great cause, for in that year King Frederick William IV, of Prussia, declared that bodily ex-

ercise was "a necessary and indispensably integral part of male education." Twenty years later, physical education was made compulsory in Prussia, and fifteen years ago, the time devoted to gymnastics in the Prussian higher schools for boys was increased from two to three hours weekly, through the personal efforts of the present great emperor who, for his achievements in the cause of physical, industrial and commercial education, might well be called "William the Talented."

It is an ill wind that blows nobody good. The failure of the German Revolution of 1848, brought to America hundreds of thousands of the brainiest and ablest men of Germany, who organized turnvereins throughout the United States, and taught the American people the value of physical training. Fortunately for the progress of our own beloved city, large numbers of them settled in our midst and their influence was so great that in the year 1861 the Cincinnati School Board adopted a resolution for the introduction of physical culture into the public schools. Public sentiment, however, was not yet ripe, and the plan failed; but the cause of physical education was growing, and within the past twenty-five years its utility has been recognized by leading educators. Athletic clubs, turnvereins, colleges, parish houses and Young

Men's Christian Associations have built gymnasiums without number in all our principal cities. Harvard College today boasts of one of the finest gymnasiums in the world.

The movement for physical culture in Cincinnati would not die, and thirty-one years after the first attempt and failure of the Cincinnati School Board to introduce physical culture, the Turners of the state with a tenacity characteristic of the German race, went to work with one will, one mind, and one might and secured the passage by the General Assembly of Ohio, on April 13, 1892, of a statute requiring physical culture to be taught in the public schools of all the large cities of Ohio. The progress in Ohio since that date has been marked, the interest of the public increased and the Board of Education, in planning new schools, has invariably made provision for gymnasiums.

No small measure of the success in our city is due to the superior technical knowledge, high character and splendid executive ability of Dr. Carl Ziegler, the superintendent.

The City of Cincinnati and the State of Ohio are not alone in this great work and handsome gymnasiums can now be found in the high schools of nearly all the large cities of America.

It is gratifying to all of our citizens to know

that Cincinnati was the first city in America in which a turnverein found its home. Twenty-five years ago the organization of the North Cincinnati Turnverein was made possible by one of the most distinguished, scholarly and polished gentlemen who ever left the Fatherland, Hon. Gustav Tafel. God has spared him to be with you tonight for your Silver Jubilee, and may He spare him to be with you for your Golden Jubilee.

It is needless to enumerate the great benefits of systematic physical training because these are well known to you and the Constitution of your society states that: "It is an association of young men and their seniors for the purpose of physical and mental development as well as the maintenance and dissemination of noble and fraternal ideas."

While the Germans have given to America the finest educational system of physical training in the world, the British have by their example, taught the wisdom of athletic sports and it is gratifying to see that an Athletic League has been organized in connection with our public schools by Dr. Ziegler to cultivate field sports. The Anglo-Saxons gave us the Bill of Rights, the Common Law and Trial by Jury; the Germans taught America and all the world the wisdom and necessity of physical, technical, and commercial educa-

tion. The Teutonic race is essentially a nomadic one, and has spread over the entire civilized world. The Jutes and the Angles and the Saxons wandered from their native heath on the Elbe and Rhine and settled in England giving the world the Anglo-Saxon race. The Anglo-Saxon and the descendants of the old common ancestors on the Rhine have both crossed the Atlantic into the Republic and given to mankind a new race—the American race—whose common forefathers in the long distant days were all Teutons. Here then in America, we see re-united the old Teutonic or Germanic race in the sons and daughters from the Mother Country and the sons and daughters from the Fatherland as one homogeneous people, working for the advancement and civilization of mankind—in which a most important factor will be physical training.

# Uniform State Laws Governing Negotiable Documents of Title.

(An address delivered before The Ohio Bankers Association, at Cleveland, Ohio, September 27, 1905.)

*Mr. President and Gentlemen—*

Our forefathers, not foreseeing that the States would some day become one country for commercial purposes,[1] failed to vest in Congress power to regulate *all* commerce, but limited that body to such as was interstate or foreign.[2] An unfortunate (and by many now believed erroneous) decision by the Supreme Court of the United States[3] in 1869, that a contract between citizens of different states did not constitute interstate commerce, checked the growth of that unity of law so convenient in the development of industries, national in character. For one hundred years, from 1789, when the Constitution was adopted, to 1890, no practical remedy

[1]Mr. Justice Bradley in Oregon S. Nav. Co. *v.* Winsor (1874), 20 Wallace 64.

[2]Constitution United States, Art. I, Sec. 8.

[3]Paul *v.* Virginia (1869), 8 Wallace 168. See also Liverpool Ins. Co. *v.* Oliver (1871); 10 Wallace 566; Hooper *v.* California (1895), 155 U. S. 648; New York Life Ins. Co. *v.* Cravens (1900), 178 U. S. 389; Nutting *v.* Mass. (1902), 183 U. S. 553. Compare Pensacola Telegraph Co. *v.* Western Union Tel. Co. (1878), 96 U. S. 1; Champion *v.* Ames (1903), 188 U. S. 321; New York Life Ins. Co. *v.* Statham (1876), 93 U. S. 24; New York Life Ins. Co. *v.* Davis (1877), 95 U. S. 425.

was presented to free commercial intercourse from the inconvenience of a distinct law for each state. In the latter year, New York created a commission on uniform state laws and called for a National Conference to which some thirty states have now responded.[4] The present year marks the fifteenth annual meeting. The first fruit of this movement was the Negotiable Instruments Code framed in 1896, now enacted in the District of Columbia, one territory and twenty-eight states,[5] its passage in Ohio[6] being largely due to the interest manifested by the Ohio Bankers Association.

---

[4]The States now represented in the Conference are Arizona, California, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Virginia and Washington.

[5]New York, Laws of 1897, chapter 612; 1898, chapter 336. Connecticut, Laws of 1897, chapter 74. Colorado, Laws of 1897, chapter 239. Florida, Laws of 1897, chapter 4524. Massachusetts, Laws of 1898, chapter 533; 1899, chapter 130. Maryland, Laws of 1898, chapter 119. Virginia, Laws of 1897-98, chapter 866. Rhode Island, Laws of 1899, chapter 674. Tennessee, Laws of 1899, chapter 94. North Carolina, Laws of 1899, chapter 733. Wisconsin, Laws of 1899, chapter 396. North Dakota, Laws of 1899, chapter 113. Utah, Laws of 1899, chapter 83. Oregon, Laws of 1899. Washington, Laws of 1899, chapter 149. District of Columbia, Laws of 1899, U. S. Stats., page 785. Arizona, R. S. 1901, Title 49. Pennsylvania, Laws of 1901, chapter 162. Ohio, Laws of 1902. Iowa, Laws of 1902, chapter 130. New Jersey, Laws of 1902, chapter 184. Montana, Laws of 1903. Idaho, Laws of 1903. Kentucky, Acts of 1904, chapter 102, to take effect June 13, 1904. Louisiana, Act 64 of 1904, to go into effect August 1, 1904. Kansas, Laws of 1905, chapter 310, approved March 7, 1905; to take effect June 8, 1905. Wyoming, Laws of 1905, chapter 43; to take effect February 15, 1905. Missouri, Laws of 1905, page 243, approved April 10, 1905; to take effect June 16, 1905. Michigan, Act 265, P. A. 1905, approved June 16, 1905; to take effect September 10, 1905. Nebraska, chapter 83, approved April 1, 1905; to take effect August 1, 1905; in Compiled Statutes of 1905, chapter 41.

[6]Act of April 17, 1902 (95 Ohio Law 162-198).

In 1902, the Conference employed Prof. Samuel Williston of the Harvard Law School to codify the law of sales which was fully discussed at the meetings of 1904 and 1905. Its special features from a banker's standpoint are the sections on negotiable documents of title, the chief examples of which are bills of lading and warehouse receipts. It codifies existing commercial usages and customs by expressly declaring that a document of title to a person or order or bearer, shall be negotiable. This code, with the exception of section thirty-nine (39) received the approval of every commissioner. The controverted section is as follows:

"If goods are delivered to a bailee by the owner, or by a person having capacity to transfer the property in them, and a negotiable document of title is issued for them and they are thereafter attached by garnishment or otherwise or are levied upon under an execution, such attachment or levy shall be invalid against one to whom the document has been negotiated for valuable consideration and who purchased it either before such attachment or levy *or within ten days after the original issue of the document in good faith and without notice of the attachment or levy.*"[7]

[7]Prof. Williston has appended the following note to this section.

"This section presents a most difficult question. If the mercantile view of these documents is carried to its logical

In view of a very vigorous opposition to this section as thus worded, the approval of the code was postponed for another year for the purpose of obtaining the views of Banking Associations, commercial organizations and others. The effect of this section is to restrict negotiability to ten days from issue. In other words, if a bill of lading or warehouse receipt is negotiated more than ten days after its issue and an attachment levied on the goods a moment before, the attachment takes preference. Two arguments were advanced in

---

conclusion, the result would be that while the document is outstanding it represents the property and that it must be seized before the property can be reached by process of law. This is the result reached in most jurisdictions in regard to bills and notes. A less complete adoption of the mercantile view would allow attachment, but would prefer to an attaching creditor a subsequent purchaser for value before maturity. Such jurisdictions as do not wholly exempt parties on bills and notes from liability to garnishment follow this rule. 14 Am. and Eng. Encyc. of Law 770, et seq. This rule has by statute in some states been applied to stock certificates, so that a subsequent purchaser of the certificate is preferred to a creditor attaching the stock on the books of the corporation. Clews *v.* Friedman, 180 Mass. 555.

"In the case of carriers, some protection against garnishment has been given. In most states, if the goods are actually in transit the carrier cannot be garnisheed. 14 Am. and Eng. Encyc. of Law, 810. A transfer of the bill of lading prevails over a subsequent attachment. Mather *v.* Gordon, 59 At. Rep. 424 (Conn.); Robert C. White Co. *v.* Chicago, etc., R. Co. 87 Mo. App. 330; Union Bank *v.* Rowan, 23 S. C. 339; and in Peters *v.* Elliott, 78 Ill. 321, it was held, though on somewhat unsatisfactory reasoning, that an attaching creditor of a consignor was postponed to one who bought the bill of lading subsequently. Compare Saunders *v.* Bartlett, 12 Heisk. 316; Oliver *v.* Moor, 12 Heisk. 482; Woodruff *v.* Railroad, Head. 87.

"Property in the hands of warehousemen can doubtless be reached as the law stands at present. In New York a statute was passed exempting warehousemen from being made defendants in any action concerning the title or possession of goods in which they claimed no right other than their lien for charges. This statute, however, was held unconstitutional, Follett Wool Co. *v.* Albany Terminal Warehouse Co., 61 N. Y. App. Div. 296. A similar statute was passed in the District of Columbia and has been sustained

support of this section. The first was, that as thus worded, it would prevent a dishonest purchaser of furniture from a furniture house on credit from taking the furniture to a railroad, obtaining a negotiable bill of lading, leaving for parts unknown, selling the bill of lading and thus cheating creditors. The other was, that it would prevent the small planter in the South who paid a bale or two of cotton a year as rent, from taking the cotton to a cotton gin warehouse, securing a negotiable warehouse receipt, leaving for parts unknown, sell-

---

by a lower court, but not passed upon by an appellate tribunal. Doubtless a prior purchaser of a warehouse receipt negotiable in form, would be preferred to a subsequent attachment, where such receipts are by statute made negotiable. Adamson *v.* Frazier, 40 Oreg. 273; Roudebush *v.* Hollis, 22 Pa. C. C. 324.

"Very probably the same result would be reached without the aid of a statute in many jurisdictions; though in Maine by statute the property is subject to garnishment until the warehouseman is notified of the transfer of the receipt, without reference to the negotiability of the receipt (Mohun on Warehousemen, 309), following the prevailing rule (left unchanged by this draft) in regard to non-negotiable receipts. Hallgarten *v.* Oldham, 135 Mass. 1. But it seems doubtful if even in states making warehouse receipts negotiable, the warehouseman is freed from garnishment, or that in garnishment proceedings a purchaser of the receipt would have a higher right than a prior attaching creditor.

"As Section 39 in this draft was first drawn, it withdrew property for which negotiable documents had been issued entirely from attachment or levy on execution and therefore compelled the creditor to seek his remedy against the document. This was first altered to a provision, not forbidding attachment or levy, but providing that a subsequent purchase in good faith would prevail over the creditor's seizure. Even this was thought by some not only too radical a departure from existing law, but also in itself objectionable because of the ready means it afforded fraudulent debtors to cover up their property. To remedy this objection, in part at lease, a limit of time within which the document must be taken in order that the purchase should prevail over a prior attachment was inserted, following the analogy of bills and notes which are not fully negotiable when overdue. It may be that the period of ten days tentatively adopted is too short a period, even if the general principle of the section is correct as it stands."

ing the warehouse receipt and thus cheating his landlord. It must be conceded that these are some of the consequences of making warehouse receipts and bills of lading negotiable but not of limiting their negotiability to ten days.

Somewhat similar consequences have resulted from making promissory notes, drafts, checks and certificates of deposit negotiable but such arguments have never been generally accepted to thus limit by law their negotiability. Similar arguments were advanced against the negotiability of scrip, but Lord Chief Justice Cockburn, in a noted English case,[8] answered them as follows: "The usage of the money market has solved the question whether scrip should be considered security for and the representative of money by treating it as such. The universality of a usage voluntarily adopted between buyers and sellers is conclusive proof of its being in accordance with public convenience; and there can be no doubt that by holding this species of security to be incapable of being transferred by delivery and as requiring some more cumbrous method of assignment, we should materially hamper the transactions of the money market with respect to it and cause great public incon-

[8]Goodwin *v.* Robarts (1875), L. R. 10 Ex. 337. See also Exploration Co. *v.* London Trading Bank, Ltd. [1898] 2 Q. B. 558, and Edelstein *v.* Schuler [1902], L. R. 2 K. B. 144, 155.

venience. No doubt there is an evil arising from the facility of transfer by delivery, namely, that it occasionally gives rise to the theft or misappropriation of the security to the loss of the true owner. But this is an evil common to the whole body of negotiable securities. * * * * It is one which is counterbalanced by the general convenience arising from facility of transfer or the usage would never have become general to make scrip available to bearer and to treat it as transferable by delivery. * * * * Lastly it is to be observed that the tendency of the courts, * * * * , has been to give effect to mercantile usage in respect to securities for money."

As no law can be framed which will not lead to some inconvenience the question is presented whether the instances of fraud suggested outweigh the great economic and industrial advantage of carrying the negotiability of warehouse receipts and bills of lading to its logical consequence as recognized in the actual usages and customs of merchants? Last year the agricultural and manufacturing products of this country amounted to eighteen billions of dollars. Is it not safe to say that in their transition from raw materials to finished products and their distribution to the consumer, they represented three times this amount,

or fifty-four billions of dollars in commercial transactions? Is it not reasonable to assert that nearly al of these products found their way either into a warehouse or on a common carrier and at some step they have been represented by either a warehouse receipt or a bill of lading? In the same year our exports amounted to $1,460,863,185, our imports to $991,090,978, a total of $2,451,959,163 each item of which must have been represented by a bill of lading. In 1903, we produced 637,821,834 bushels of wheat, 2,444,176,924 bushels of corn and 10,727,559 bales of cotton. Is it not safe to say that the bulk of these staples was represented by both bills of lading and warehouse receipts? Are the few instances of fraud suggested sufficient to outweigh these colossal transactions, block the wheels of commerce and overthrow well recognized commercial customs and usage by the enactment of this section as thus worded as a rule of law in every state of the American Union? Will bankers continue to advance money on documents which may be subject to secret liens? If the bankers refuse to advance money the bankers will not suffer but all the industries of our country. If the consequence of the enactment of this section into law is a refusal by the bankers to advance money to a producer who wishes to meet

his cost of production and hold his goods for a rising market, a complete overthrow of the universal methods of doing business, which have contributed to the commercial supremacy of the United States, will follow.

The great commercial consequence of negotiability is to turn tangible property and credit into flexible paper currency. As has been well said, the doctrine of negotiability rests upon the banking or currency theory. A warehouse receipt or bill of lading to be truly negotiable must stand on exactly the same basis as a bond if it is to pass current as a part of our flexible paper currency, so necessary to the expansion of our trade and commerce.[9]

Demand promissory notes merely represent intangible credit and may become overdue; negotiable documents of title are the representatives of tangible property and therefore are never overdue.

The merchants gave to the law their customs and usages and now that our legislative bodies are to give to the merchants codes of mercantile law, these codes should so far as possible, embody these customs and usages freed from legal jargon and unhampered by mere legal rules except such as are based on ethical principles underlying all American jurisprudence and principles of economics under-

[9]See Introduction to Third Edition of Chalmer's Digest Bills, Notes and Checks.

lying sane and sound commerce.[10] The commissioners therefore look to you for answers to these questions and for information as to what customs and usages should be embodied in these rules of law.

The struggle to secure from courts and legislative bodies full recognition of the customs of merchants, as the law of the land, is an old one. Drafts for a long time were the only documents regarded as negotiable. So late as 1702,[11] Lord Chief Justice Holt declared that promissory notes were "invented in Lombard Street which attempted * * * * to give laws to Westminster Hall; that the continuing to declare upon these notes upon the custom of merchants proceeds from obstinateness and opinativeness;" and in 1703[12] that "the(se) notes * * * * are only an invention of the Goldsmiths in Lombard Street, who had a mind to make a law to bind all that dealt with them." Parliament in 1704[13] came to the relief of the merchants and passed a statute declaring promissory notes negotiable. After vigorous legal struggles bank notes,[14] checks,[15] bonds,[16]

[10]See Scrutton Elements of Mercantile Law, Chapters I and II.
[11]Clerke *v.* Martin (1702), 2 Lord Raymond 757.
[12]Buller *v.* Crips (1703), 6 Modern Reports 29.
[13]3 & 4 Anne, Chap. 9 (II Statutes at Large 106-108).
[14]Miller *v.* Race (1758), 1 Burr. 452.
[15]II Daniel, N. I. (5th Ed.) § 1566.
[16]By statute. Bigelow, B. N., & C. (2d Ed.), 10. Of corporations, without statute: Ibid.

scrip[17] and certificates of deposit[18] were successively adjudged negotiable and bills of lading,[19] warehouse receipts[20] and certificates of stock[21] *quasi* negotiable. These judicial decisions as to warehouse receipts and bills of lading did not fully reflect the commercial view and in thirty-five states[22] laws have been passed in which they are declared to be negotiable, and in eleven[23] of which, are declared to be negotiable to all intents and purposes as drafts or promissory notes. This very variety of legislation and conflict of decisions have given rise to the necessity for codifying the law governing documents of title and securing the enactment of the same code in each state. The Commissioners already have a draft of a warehouse code[24] in their hands and a code governing bills

[17]Goodwin *v.* Robarts (1875), L. R. 10 Ex. 337.

[18]2 Daniel N. I. (5th Ed.), § 1698*a*, etc.

[19]Lickbarrow *v.* Mason (1788), 2 Term Reports 63.

[20]See 2 Daniel N. I. (5th Ed.), § 1713, etc.

[21]2 Daniel N. I. (5th Ed.), § 1708, etc.

[22]Alabama, Arkansas, Arizona, California, Colorado, Connecticut, Delaware, Georgia, Illinios, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington and Wisconsin. See *Mohun on Warehousemen*, pp. 3, 24, 27, 38, 43, 59, 63, 75, 81, 83, 97, 177, 194, 230, 255, 281, 285, 293, 294, 307, 309, 314, 315, 316, 333, 354, 382, 457, 458, 485, 496, 508, 524, 545, 591, 592, 603, 620, 635, 660, 678, 688, 717, 733, 752, 763, 764, 778, 798, 800 and 822.

[23]Arizona, Indiana, Kansas, Kentucky, Louisiana, Maryland, North Dakota, Tennessee, Texas, Washington and Wisconsin. See *Mohun on Warehousemen*, 24, 194, 230, 255, 281, 285, 293, 294, 307, 315, 316, 620, 752, 763, 764, 798, 800 and 822.

[24]Prepared by Prof. Samuel Williston, of the Harvard Law School, and Mr. Barry Mohun, of the Washington, D. C., Bar.

of lading is being prepared.[25] The proposed warehouse code has in it a section[26] similar to section thirty-nine (39) to which attention has been called. An error in one necessarily means a repetition of the error in the other.

It is to the bankers and merchants that the Commissioners on Uniform State Laws must look for support in their work of codifying the commercial law. When the question was first agitated in the year 1880 in England of codifying the law of Negotiable Instruments, it was The Institute of Bankers and the Associated Chambers of Commerce that employed the expert to draft the bill.[27] Following the precedent set in our mother country, we appeal to you bankers to guide us in this most important work of making the law governing negotiable documents of title uniform throughout the United States.

---

[25]By Prof. Samuel Williston.

[26]As section twenty-four (24).

[27]Introduction to the Third Edition of Chalmers' Digest Bills, Notes and Checks.

# A Public Manual Training High School for Cincinnati.

(An address delivered at the Commencement Exercises of the Cincinnati Technical School of the University of Cincinnati, June 11, 1903.)

*Mr. President, Ladies and Gentlemen—*

To properly answer the question whether a public manual training high school should be added to the Cincinnati school system, involves a brief reference to the nature and objects of education. Direct and indirect self-preservation, family duties, civic obligations and recreation embrace the human activities. Direct self-preservation consists in protecting the body from accident and disease; indirect self-preservation, in securing the necessaries of life; family duties, in protecting those for whose being we are responsible; civic obligations, in maintaining the government; recreation, in spending our leisure time in pursuit of pleasure and the refinements of life. The object of education is to fit mankind to properly perform the activities of life by imparting useful information and disciplining the faculties. Some knowledge of all subjects is so valuable that mere exhaustive knowledge of a few is unwise, and the great problem is to de-

termine the order in which educational topics should be pursued, and the amount of time to be devoted to each. Its solution depends upon a correct understanding of their relative importance, not of their abstract value. The shortness of life, and especially the brevity of school life, are too often ignored by the theoretical in making inductions. As direct self-preservation is necessary to human existence, a relatively high degree of importance should be given to those branches of education which teach how to preserve life and health. Because all must be fed, housed and clothed, education in those sciences which underlie the arts pertaining to the production and distribution of the necessaries of life is relatively next in importance.

As education is a practical matter it must be dealt with in a practical way. While all are born equal before the law, nature has endowed each with individual traits and abilities, and schools are intended to develop native talents and so direct them as to help the individual to human happiness. Courses of study should be sufficient in number to fit the various aptitudes of pupils, and thus only can schools be made useful and bring the greatest good to the greatest number. Education is of such paramount importance and founded so deeply in public policy that schools are and should be main-

tained at public expense. A greater percentage of the public revenue is devoted to this one subject than to any other. It cost the City of Cincinnati $1,026,460.71 to maintain her schools for the past school year, and it is estimated that in addition, nearly an equal amount of money was expended in supporting parochial, other sectarian and private schools.

The question squarely presents itself, whether the courses of study in the schools of this city are sufficiently numerous to fit the diversified needs of the people. It is not a question of changing the courses of study now in use, but of adding others better fitting the needs of a majority of our people. For centuries attention has been given to the ornamental, to the exclusion of the useful, educational topics being taken up in the inverse order of their importance, and while the ornamental should be taught, it should be subordinated to subjects of practical value. In the public high schools of the City of Cincinnati, subjects pertaining to direct and indirect self-preservation occupy inferior positions. All men cannot belong to the professions, all men cannot be teachers; some have inborn talents for the professions, others for business and commerce. A person entering upon a professional career should receive a training fitting him there-

for and this is equally wise as to a person about to embark in business or commerce. This is particularly true in the City of Cincinnati where manufacturing gives employment to sixty-three thousand two hundred and forty of her citizens.

As the result of the present courses of study, our young men and women, whose educational careers end with the high school, are school taught in the ornamental and conventional, and are left to self-education in the necessary and practical.

What has been said, of course, does not so fully apply to those who intend to pursue an academic, technical or scientific course of instruction after they leave the high school. The question will naturally be asked, how can a boy or girl be given a liberal education which will fit him or her for the realities of life without turning our institutions of learning into mere trade schools? This has been answered by the establishment of manual training high schools. Manual training schools have not grown in a day. While trade schools were first established in Russia more than a century ago, and then spread to Belgium and France, and finally throughout Europe, the first educational institution resembling, in a small degree, a manual training school was established in London by Dr. Birbeck in 1827, under the name of "Mechanics' In-

stitute," and the second by public spirited citizens of Cincinnati in 1828, under the name of the "Ohio Mechanics' Institute." It was not until 1868 that a course of manual training, in the sense in which it is now understood, was introduced in the Imperial Technical School at Moscow by Victor Della-Vos. Similar schools were established as departments of universities or as independent schools by enterprising citizens and commercial bodies, and the Technical School of Cincinnati, in 1886, by Mr. M. E. Ingalls and other distinguished citizens. Their importance as proper subjects of public support was first recognized by Baltimore, which city, in 1883, established the first public manual training high school. The Boards of Education of Eau Claire, Wisconsin, and Toledo, Ohio, in 1884; Philadelphia and Omaha in 1885; Cleveland in 1886, and of Kansas City, Indianapolis, Chicago, Boston, and other cities at later dates have also added public manual training high schools. Although Cincinnati manufactures nineteen per cent. of all goods made in Ohio and occupies first rank as a manufacturing city and as a centre of railroad distribution, and twenty years have elapsed since manual training became a recognized branch of high school education, yet our city is still without a manual training high school. Two obstacles seem

to have been the cause: one a misunderstanding as to their nature, and the other a lack of inclination to devote the public funds to upbuilding and advancing our high schools.

It has been a popular belief that a manual training school was a mere trade school for the education of tradesmen. Manual training high schools as now conducted are not intended as trade schools, but to give young men and young women liberal educations and a knowledge of the sciences underlying the industrial arts. The only difference between the course of instruction in our high schools and in a manual training high school is that a relatively greater importance is given to practical subjects than to those which are merely conventional. This is very readily seen from the course of studies usually pursued in a manual training high school, which includes Music, Elocution, Physical Culture, English, Rhetoric, Literature, History, Civil Government, Political Economy, Language, Algebra, Geometry, Trigonometry, Surveying, Physiology, Zoology, Meteorology, Mineralogy, Geology, Botany, Physics, Chemistry, Electricity, Laboratory Work, and Free Hand, Mechanical and Illustrative Drawing, with special reference to shop work. To these are added actual shop work, which includes joinery, wood-carving, wood-turning,

moulding, pattern-making, forging, ornamental and useful wrought-iron work, use of machine tools, clipping, filing, turning, drilling, planing, milling and construction of machinery.

In some manual training high schools, such as those of Kansas City, girls may elect to take sewing, millinery, dress-making, cooking, domestic economy, household economy, arithmetic, book-keeping, type-writing, and stenography in place of shop work; and in Indianapolis, sewing, cooking, hygiene and home nursing. While these optional courses of instruction for girls in manual training high schools are novel their wisdom has been justified by experience. In the City of Indianapolis there are enrolled one thousand four hundred and eighty-five pupils in the Manual Training High School, of which number seven hundred and sixty-five are boys and seven hundred and twenty girls. Last year there were enrolled in our high schools two thousand four hundred and twenty-six pupils, with an attendance of one thousand nine hundred and forty-eight. Comparing the population and school attendance of our high schools with those of Indianapolis there ought to be enrolled in the high schools of Cincinnati four thousand five hundred pupils, or nearly double the number actually enrolled.

The necessities of the people are such that the great mass of our citizens are unable to maintain their boys and girls at high schools when provision is not made to educate them in the branches which fit them to fulfil their duties in life. This is shown by statistics of all cities. In those where manual training high schools are provided the attendance is usually doubled, showing that the necessities of our people require that schools be provided in which are taught the useful arts and the sciences underlying them. The average attendance in the United States of each pupil at school is but five years. The school reports show that one fruit of the introduction of manual training in the public schools is to materially lengthen the period of school attendance, resulting in a better general education of a largely increased number of the people. In our high schools to-day not more than ten per cent. who enter graduate, while in most manual training high schools about seventy-five per cent. complete the course.

Manual training is of material assistance to pupils in choosing a vocation. How well we know that one of the chief causes of failure in life is error in such a choice. While errors will continue to be made in the selection of life work, these will be materially reduced by affording children an op-

portunity of ascertaining their fitness for a particular occupation. Manual training schools give those of a mechanical turn equal chances with those of literary taste. To-day every boy who desires to pursue a high school course is forced into literary work for which he may have no aptitude with the result that one boy is given an unfair opportunity over another, who, with a proper education, would have excelled in a mechanical or mercantile pursuit.

If it be a wise public policy to maintain common schools at public expense, the same policy would seem to dictate the erection, equipment and maintenance of public manual training high schools. The large attendance in cities maintaining manual training high schools compared with those where no such schools exist demonstrates the growing demand for manual training high schools.

Is Cincinnati in need of a public manual training high school? No doubt can exist that much of the industrial development of this city is due to the establishment of the Ohio Mechanics' Institute seventy-five years ago. While for many years its work was not carried on in a systematic way, the magnificent management of Professor John I. Shearer during the past five years has brought the attendance of that school up to about one thousand

four hundred pupils. With its limited income of $20,000.00 a year it has done much in the cause of manual training. The Cincinnati Technical School, established in 1886, has by the high quality of its work advanced the cause of liberal education and the commerce of our city, and while it fills a long-felt want and has done much good, but few of her citizens have the means of sending their children to it. Whether Cincinnati does or does not need a manual training high school depends upon the nature of her industries, and the question presents itself whether her industries are of a kind to require the immediate erection of a manual training high school. This question has been answered by the twelfth census of the United States, which shows that two hundred separate branches of manufacturing are carried on in the City of Cincinnati, which include five thousand one hundred and twenty-seven establishments, employing sixty-three thousand two hundred and forty persons, and paying annual wages to the amount of $27,189,069. Of these two hundred industries one hundred and fifty are of magnitude; of these one hundred and fifty at least fifty-one employ persons who should have been educated at manual training schools. In these fifty-one industries are included one thousand four

hundred and ninety-two distinct establishments employing twenty-two thousand three hundred and seventy-six persons, and paying annual wages to the amount of $10,816,834. An analysis of these statistics shows that the metal-working, wood-working, and combined wood and metal-working establishments are one thousand two hundred and forty-seven in number, employing twenty thousand three hundred and twenty-five persons, and paying annual wages to the amount of $9,715,389. These are divided as follows:

Metal-working: five hundred and ninety establishments; employing nine thousand nine hundred and sixty-nine persons; annual wages $4,743,846.00;

Wood-working: five hundred and sixty-four establishments; employing six thousand and ninety-nine persons; annual wages $3,231,348.00;

Combined wood and metal-working: ninety-three establishments; employing three thousand three hundred and sixty-six persons; annual wages $1,740,195.00.

The other miscellaneous establishments in the fifty-one branches are one hundred and forty-five in number, and employ two thousand and fifty-one persons, and pay in annual wages the sum of $1,101,465.00. The three thousand six hundred and thirty-five other establishments employ forty thou-

sand eight hundred and sixty-four persons who receive annual wages of $16,372,535.

Although the erection of a manual training high school was strongly urged by Hon. Michael G. Heintz, Chairman of the Committee on Manual Training of the Board of Education, and by Dr. Boone and other educators, no concerted move has yet been made for the erection of a manual training high school.

Can Cincinnati afford to build a manual training high school? Her people every year contribute more than $1,000,000.00 to the cause of common school education. From the school year ending August 31, 1893, to the school year ending August 31, 1901 (a period of eight years), the Board of Education spent $127,733.00 for vacant lots. From the school year ending August 31, 1892, to the school year ending August 31, 1902 (a period of ten years), the Board of Education spent for new school buildings $1,002,072.00, or a total for lots and buildings during the past ten years $1,129,-805.00, an average of $112,980.00 per year. During the last year of the ten $121,610.00 were expended, thus exceeding the yearly average. It would seem to follow that the City of Cincinnati not only needs a manual training high school, but can afford to erect such an institution, and the tax-payers of

Cincinnati will support the Board of Education in the project to erect and equip a manual training high school for $500,000, sufficient to accommodate two thousand five hundred pupils.

As it cost $106,680.07 last year to conduct the high schools with an enrollment of two thousand four hundred and twenty-six pupils, the cost per pupil enrolled was $43.90. The cost of conducting the manual training high school at Indianapolis, with an enrollment of one thousand four hundred and eighty-five pupils, was the sum of $63,752.13, or $43.00 per enrolled pupil, which is ninety cents per pupil less than it cost to conduct the Cincinnati High Schools. Experience thus demonstrates that a manual training high school can be conducted more economically than a literary high school.

Cincinnati will either go forward or backward; no city ever stood still. The census of 1900 was extremely discouraging to a number of our citizens. It made a comparison between 1890 and 1900, and showed a decrease of thirty-four and five-tenths per cent in the number of manufacturing establishments; a decrease of twenty-four and nine-tenths per cent in the number of wage earners; a decrease of twenty-six per cent in the amount of wages paid, and a decrease of nineteen and five tenths per cent

in the value of her manufactured products. In 1900 the sum of $109,582,142.00 was invested in manufacturing establishments, an increase of four and nine-tenths per centum. It is proper, however, to add that these figures have been vigorously assailed by Mr. C. B. Murray, the highly respected and intelligent Superintendent of the Cincinnati Chamber of Commerce, in the fifty-third annual report of that public spirited organization.

The facts shown by the last census must be met face to face if we are to profit by experience. If Cincinnati had established public manual training high schools when Baltimore did, in 1883, to-day we would have had a body of at least twelve thousand trained men, and the census figures might have been reversed. The best information now obtainable shows that Cincinnati to-day outstrips her record at any former time in the variety, quantity, quality and value of her manufactured products. Her commercial bodies have spoken with practical unanimity in favor of the establishment of manual training schools. Her educational bodies should look upon the problem from the same point of view as her commercial bodies, and by united action make Cincinnati the center of manufacturing in the world in the character and variety of her manufactured products.

The splendid work done by the Cincinnati Technical School should be a lesson to the members of the educational bodies charged with the duty of fitting the youth of our city for the obligations of citizenship.

# The Merit System.

(An address delivered at the Seventy-sixth Monthly Dinner of the Manufacturers' Club of Cincinnati at the Queen City Club, Monday evening, January 28, 1907.)

*Mr. President and Gentlemen—*

In discussing the Merit System an attempt will be made to emphasize three ideas: first, that there is a distinct administrative department of government; second, that the merit system is truly American and third, that the evils existing in a constitutional representative Democracy may be corrected by the substitution of the merit for the spoils system.

It is a trite saying that government is divided into three departments—legislative, executive and judicial. Nothing was ever more erroneous. There is a fourth—administrative. It is true that in most English speaking nations and states there are but three *independent* departments. While the administrative branch is a truly distinct one, yet its constitutional independence as a separate department has been recognized by but one state of the American Union—New York—and there protected by constitutional limitations.

It is easier to illustrate than define the differ-

ence between an executive and an administrative act. It is apparent to every one that the acts of a President of the United States, of a Governor of a State, or a Mayor of a City are executive. It is perfectly clear that a policeman upon his beat, a fireman putting out a fire, a clerk recording deeds, a meter clerk reading a water meter, and an engineer testing street materials, each performs an administrative act. It is clear that the President of a corporation who outlines its industrial, financial and commercial affairs performs executive acts. It is clear that a bookkeeper, cashier, foreman, mechanic and laborer perform administrative acts. The President of the United States, who appoints judges of the Federal Courts does not thereby exercise any judicial powers. The marshal or sheriff of a court who carries out the court's decrees does not exercise judicial powers, but merely administrative functions. In a corporation you have the executive department through the executive officers; and you have the administrative departments, such as accounting, with its bookkeepers; the industrial department where are produced articles for commerce; the shipping department wherein the goods are distributed. Each department, while separate, is a co-ordinate department, to produce one common result. Each department

is more or less independent of the other departments. While the departments are independent of each other, the members of the administrative department are subject to the orders of the executive department.

It has been the failure to recognize the administrative department as a separate, independent department of government, that has given rise to many, if not most, of our political abuses.

A political history of our mother country is a chronicle of abuse of the administrative branch of the English government by her Kings. The selection of persons for office upon the ground of fitness was one of the articles of Magna Charta. The rebellion of Watt Tyler, Jack Cade, the establishment of the Commonwealth under Cromwell and the Revolution of 1688 would never have taken place were it not for the abuse of administrative powers.

The shifting of kingly powers to the House of Commons in 1689 resulted in a division of the spoils between the king and leaders of political parties. Thus the spoils system in its origin and practice is truly English. Among the abuses by King George III set forth in the Declaration of Independence was that:

"He (King George III) has erected a multitude

of new offices and sent hither swarms of officers to harass our people and eat out their substance."

The sole tests of fitness for public offices from the time of George Washington to Andrew Jackson, were "Is he competent?" "Is he honest?" All served during good behavior, with power or removal vested in the President by the act of 1789.

While the merit system was thus established in the Federal government from its inception, the spoils system early took root in the states of New York and Pennsylvania. It was unpopular to remove a federal official and the spoilsmen began an insidious attack by the act of 1820 known as the Tenure of Office Act, limiting federal appointments to four years.

The tests of appointment and tenure, "Is he competent," "Is he honest," prevailed unimpaired from 1789 to 1828 and were not entirely abrogated until William L. Marcy, a senator from New York, proclaimed in the Senate of the United States, in 1833, "To the victors belong the spoils." Then was the American merit system overthrown and in its place substituted the English spoils system.

It is strange that within a year after the public proclamation of the spoils system in America, the English Government turned to the merit system. Through the influence of Lord Melbourne in 1834,

the merit system was introduced in the British Government by instituting a system of non-competitive examinations.

In America the first step toward curtailing the evils of the spoils system was when Congress in 1853 required all clerks in the Treasury, War, Navy and Interior Departments to be divided into four classes and subject to non-competitive examinations. In 1855, the State Department was added.

On May 21, 1855, the Queen in Council, under the guidance of Lord Palmeston, appointed a Civil Service Commission. This was the first recognition of administrative functions as an independent branch of government by the appointment of an independent body to determine the fitness of candidates for office. A limited competitive examination was recognized in part. Equal opportunity before the law was not proclaimed in England until July 4, 1870, when the open competitive system was substituted for the non-competitive and limited competitive systems.

President Grant, a native of Ohio, strongly recommended to Congress the passage of a law on this subject. This resulted in the Act of March 3, 1871, which authorized the President to prescribe rules and regulations and to appoint a com-

mission to conduct inquiries as to the fitness of candidates for office. After four years existence, Congress failed to make any further appropriation to carry on the work and in 1875, President Grant was compelled to abandon it for lack of support.

Gen. Rutherford B. Hayes stood upon the first platform to definitely declare for the merit system. In his letter of acceptance and inaugural address, he declared himself in favor of the appointment of public officials in the administrative branch of the government solely upon the ground of merit. He was weakly supported, but some of his cabinet officers, notably Hon. Carl Schurtz, maintained an efficient merit system in their departments.

Hon. George H. Pendleton procured the passage of the Act of January 16, 1883, for the appointment of a Civil Service Commission whose work should be carried on under rules and regulations formulated by the President.

New York followed and passed a similar law on the fourth day of May, 1883. Massachusetts kept up the procession and its civil service law was passed on the third day of June of the year 1884. Its provisions are enforced in state offices and twenty-seven cities.

Practical administration of the federal civil service law was impeded at every step and con-

certed attempts made in Congress to prevent appropriations to carry it into effect. Hon. William McKinley raised his voice in the House in favor of appropriations to carry on the work each time an attempt was made to defeat them and declared that the civil service reform law "is sustained by the best sentiment of the country, Republicans and Democrats alike."

The State of New York turned the administrative branch of government into an independent constitutional department by the new constitution of that state of 1894, which declared that "Appointments and promotions in the civil service of the State, and of the several divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, so far as practicable, by examination which, so far as practicable, shall be competitive; provided, however, that honorably discharged soldiers from the army and navy of the United States in the late civil war, who are citizens and residents in this state, shall be entitled to preference in appointment and promotion without regard to their standing on any list from which such appointment or promotion may be made. Laws shall be made to provide for the enforcement of this section."

The legislature of Illinois on March 25, 1895,

passed a law permitting a city by popular vote to adopt the merit system. The City of Chicago by an overwhelming vote at once put the merit system into force and effect. This was followed ten years later by the act of May 18, 1905, adopting the merit system for Cook County, Illinois, and the Act of May 11, 1905, making the merit system applicable to all charitable institutions in the state.

The State of Wisconsin, by the act of June 14, 1905, provided for the application of the merit system to all its state institutions. The City of Milwaukee enforces the merit system in all city appointments. Five other cities in Wisconsin enforce the merit system in the police and fire departments.

The most recent state of the Union to legislate upon this most important subject was Pennsylvania, which, by the act of March 5, 1906, applied the merit system to all cities of the first class, which would include the great municipalities of Philadelphia and Pittsburg.

The State of New Jersey had as early as May 20, 1885, passed a law to remove the police and fire departments from political control in cities of the first class and Newark enforces its provisions.

In 1895 Indiana placed the schools for the blind and deaf, and four insane asylums under the merit

system, and in 1897 added the State Reformatory.

In Iowa the state institutions have also been placed under the merit system.

In addition, the charters of the cities of San Francisco and Los Angeles, California; Seattle, Washington; New Haven, Connecticut; New Orleans, Louisiana, and Denver, Colorado, have placed the administrative branches of those cities under the merit system.

The question of introducing the merit system in Kansas City, Missouri, was submitted to a referendum at a popular election before the people and the proposition defeated.

The growth of the merit system in Ohio has been gradual and conservative. The first attempt in the state to remove any administrative branch of government from the spoils system was the act of March 28, 1876, applicable to the City of Cleveland, providing that firemen should serve during good behavior and should be discharged for cause only. Two years later by the Act of April 18, 1878, the Fire Department of the City of Cincinnati was placed on a similar basis.

The year 1884 is the blackest in the political history of Cincinnati. The Police Department was turned into a machine to overthrow the popular will and citizens were robbed in the shadow

of the churches by members of the police department. The spoils system with its attendant evils of blackmail and robbery aroused the citizens to such a pitch that our commercial organizations secured the passage of a new charter for the City of Cincinnati on March 30, 1886, which introduced the merit system into the Police Department of Cincinnati for the first time. It provided for a non-partisan Board of Police Commissioners and a system of non-competitive examinations for all candidates for the police force. It allowed removals for cause only and prohibited members of the police force from taking an active part in political affairs, interfering at primary or general elections, from attending conventions as delegates, from interfering by force or otherwise with the selection of candidates at primaries or in conventions. It further provided that no person should be selected because of any political service or affiliations. Members of the police force were not to be appointed for a definite period of time, but during good behavior, and were not to be reduced in rank except for cause. By the year 1893 the Police and Fire Departments of the four cities of Cleveland, Columbus, Dayton and Cincinnati had been placed under the merit system.

The most radical advance in the merit system

in Ohio was made during the administration of Governor Nash. The Municipal Code which was enacted on October 22, 1902, extended the merit system in the Fire and Police Departments in the above named four cities to the seventy-one cities of Ohio. It provided that in the Police and Fire Departments persons could be appointed only after open competitive examinations of a character to determine the fitness of the applicants for office. It prohibited political assessments and provided for promotion by ascertained merit. It required that the chiefs of the Police and Fire Departments should be appointed only from the classified lists.

Efforts have been made to break down this measure by exempting the chiefs and chief deputies of the Police and Fire Departments but such efforts have fortunately failed.

The merit system is gradually finding favor with our citizens and public officials. The City Auditor has declined to remove competent officials from office and has filled vacancies solely upon the ground of merit. In the City Solicitor's office subordinates have been selected irrespective of politics. The Chiefs of the Health Department and of the Street Cleaning Department have strongly advocated the merit system in their respective departments, but have not received cordial support. The business

organizations of the City have secured the approval by the Board of Public Service of a plan for the gradual introduction of the merit system in the Water Works Department. What our public officials need is a strong law which will sustain them so that the administrative branches of the City Government can be made independent of the political forces of the executive and legislative departments and all departments thereby placed on the same footing as the Police and Fire Departments. No system has ever been devised which is not subject to some abuses and we cannot but regret the effort in many directions to break down the merit system in our Police and Fire Departments by mere captious criticisms.

It is most pleasing to know that our Board of Education has introduced the merit system in determining the selection of candidates for positions as teachers in our public schools. There is already a marked improvement in the character of persons selected for teachers in our public schools and when this new merit system in our School Department becomes fully inaugurated our schools will be restored to their former condition as the best in the United States.

The evils of the spoils system and the wisdom of the merit system have been so long and so often ex-

plained that it is useless to spend time in rehearsing them. They have been the subject of so much public discussion that you are already familiar with them.

The United States Civil Service Commissioners in their 23rd annual report to the President of the United States dated November 5, 1906, well said:

"No system of selecting government employees which will absolutely eliminate the unfit or necessarily secure the most competent has been or probably can be devised. The experience of every civilized nation shows, however, that the plan of selecting employees by open competitive examinations results in a smaller percentage of failure than any other system of appointment. The difficulty of securing a vigorous enforcement of the provisions of the civil service act is constantly growing less owing to the increasing spirit of co-operation shown by the heads of executive departments and officials generally, both at Washington and in the country at large. While appointing officers, under the rules, may appoint any one of the highest three eligibles, in nearly ninety per cent of the cases they follow the order of the register in making appointments, which obviously excludes all political considerations. The practice of levying political assessments on government employees, which was

well-nigh universal prior to the passage of the civil service act, is now very rarely resorted to. Here and there, contributions are made by government employees, but the Commission seldom receives a well founded complaint of actual compulsion."

Out of more than three hundred thousand positions under the Federal Government, about one hundred and seventy-five thousand are filled after open competitive examinations. This shows the remarkable progress in the introduction of the merit system in the Federal Government twenty-three years ago. The business men of this country have long felt that the reason our foreign commerce in manufactured goods had not been extended was because of the inefficiency of our consular service, growing out of the appointment of consuls solely for political reasons. The gradual introduction of the merit system into the consular service promises much for the future and its introduction is owing solely to the united efforts of the business organizations of this country. What the business organizations have done for the Consular Service of the National Government they can also do for the administrative departments of Cincinnati.

The fundamental principle upon which rests our

splendid federal and state governments is a constitutional representative democracy.

Constitutional representative democracy is and always ought to be the corner stone of free government. Because of mis-government brought about by the spoils system the radical reformers desire to break down our present system of constitutional representative democracy and substitute in its place a pure democracy by the use of the initiative, unlimited referendum and recall, substituting socialism and communism for individualism, with the attendant evils of government ownership of railroads, coal mines, oil wells and cattle ranches and municipal operation of public utilities.

These suggested remedies are absolutely destructive of constitutional representative democracy and individualism. Why fly to these unknown experiments for the purposes of correcting the abuses of government caused largely by the spoils system?

Why not apply the well known and tried remedy of the merit system which has proven itself to be the sure means for the restoration and preservation of constitutional representative democracy under which we have grown great politically, morally and industrially?

Le us proceed gradually but firmly in supplanting the spoils system with the merit system.

We have begun well in Ohio where the police and fire departments of the seventy-one cities of the State have been removed from politics.

Let us next take the hospitals, infirmaries and jails out of politics. This can be followed by the state charitable institutions and finally extended to all branches and departments of state, county and municipal government.

Begin at first with the non-competitive system as was done in England and gradually substitute for it the open competitive system.

Natives and officials of Ohio have been exemplars, constructors and defenders of the American merit system. Grant urged it upon Congress and appointed the first American civil service commission; Hayes stood upon the first political platform, earnestly advocating a merit system; Garfield was the unhappy victim of the maddened brain of a disappointed spoilsman; Pendleton was the father of the first efficient National Civil Service Law; McKinley raised his voice at all times in Congress in support of appropriations to carry on the great work; Judge Thoman was a member of the first civil service commission under the Pendleton law; Garfield, the Junior, a civil service commissioner under Roosevelt; Taft introduced the merit system into the insular possessions; and under Nash the

merit system was extended to the police and fire departments of seventy-one cities in Ohio.

I have an abiding faith in the conservatism, patriotism and wisdom of our citizens and their representatives and believe that when the time is ripe, Ohio will take her place beside Massachusetts, New York, Wisconsin and the Federal Government in making the administrative branch of the Government of Ohio and its counties and cities independent of the other departments.

# Education.

(A response at the annual dinner of the Ohio State Board of Commerce, Southern Hotel, Columbus, Ohio, December 17, 1904.)

*Mr. Toastmaster and Gentlemen—*

I dreamed last night that I was dead, and as the airship-dead-car put me ashore in the other land, I saw just ahead of me a handsome, dapper little gentleman with a red bag in one hand and a bright object in the other. As he trudged along ahead of me up to the gate, I thought, "Now, if I can only take hold of his coat-tails it may be I will be taken in too, because he always *gets there.*" But as I made a dash for my friend, Allen R. Foote,* I was grabbed by a colored messenger of St. Peter who said I would have to wait my turn. I objected strenuously to being held by a colored man, but he reminded me that under the Constitution of the United States, which he said was in force in Heaven, there could be no discrimination on account of race, color, or previous condition of servitude. The little gentleman with the red bag whispered to St. Peter and passed in. I walked up to the gate and St. Peter said, "Where are you from?"

*He had just been presented with a loving cup.

"Ohio," I said.

"What was your occupation?"

I told him.

Then he said, "To what did you ever belong in life?"

I said, "I belonged to a great many organizations and was a member of the Ohio State Board of Commerce."

He said, "You can't come in."

"But you let Foote in," I said, "and he belonged."

"That's true," he answered, "but Foote has his *loving cup* and has promised to open a *cold bottle.*"

I told him I was chairman of the Committee on Resolutions, but he said he was very fond of a cold bottle but not of "hot air." He said, "Take the elevator!"

I took the elevator and when I reached the bottom, I found Old Nick waiting. He said, "Hello, James, I'm glad to see you; I've been looking for you," and he offered to show me around. Just then two or three fellows grabbed a woman and put her in the fire and she burned very quickly. I said, "Who is that woman you are treating so cruelly?" He said, "You ought to know; she was the most famous citizen in Ohio."*

*Cassie Chadwick, who was then under arrest, accused of swindling a number of very able Ohio bankers.

Then we came to where several men were sitting on a bench and they were thrown in the fire, but they did not burn. They were taken out and put on a bench and the fire stirred up and were again thrown in. This was repeated several times, but although their clothing burned *they* did not burn. I asked who they were and Old Nick replied, "That's a bunch of Ohio bankers." I asked Satan: "Why don't they burn?" He said, "They are *too green* to burn!"

The toast assigned me is "Education in Ohio," and I take it that by this is meant more particularly free education. We must remember that something over one hundred years ago free education as a matter of State support, was practically unknown in the world. Those who received free education, received it merely as charity pupils, with all the stigma attached by many classes of society to those who receive charity. But when the Revolution swept away the British power and the Thirteen Colonies established a new government under the Articles of Confederation, years before the establishment of the Constitution of the United States, many of these Colonies having territory in the West surrendered it to Congress. Congress, by the Ordinance of 1787, created the great Northwest Territory, and builded this Northwestern Terri-

tory upon foundations which were to last forever. It proclaimed the liberty of man. It provided that, "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Ohio, therefore, had a most auspicious beginning. That proclamation was founded upon the principle that free education was not a matter of charity; that when a person in the Northwest territory entered school, he entered as a matter of right the same as his neighbor, be he rich or be he poor. Therefore, it was established that education was a matter of equality before the law, and in the eyes of all mankind.

The early schools of the State were necessarily primitive. There were no colleges maintained at public expense. If there were any colleges they were maintained by private contributions. So the early opportunities for education were limited.

But Ohio has builded well. She has contributed liberally to her public schools for the education of her people, in order that they might be good citizens, good neighbors, good men and women, and might help themselves to better their own and their neighbors' positions in life.

But when it came to establishing a system of

public education, those entrusted with the duty of enforcing the principles of public education followed the traditions of centuries past, making prominent the classics, and failing and neglecting to provide for that which is useful. The world has shown dense ignorance in the matter of education. It has seemed to be so much in the dark, so bound by traditions and conservatism, that educational matters have continued to be administered in this unwise manner, not only in the State of Ohio, but throughout the English-speaking nations of the world.

It was not until light was thrown upon the subject by Herbert Spencer, when he gave to the world his beautiful little book upon the subject of education, that any change of system was made. He pointed out forcefully, tersely, convincingly, conclusively, that the whole system of education in the English-speaking nations was based upon wrong principles. He maintained that schools should teach the sciences as well as the classics; that the object of education was not the mere storing of knowledge, but the disciplining of the faculties in order that they might be trained for acquiring information as the individual went through life.

This great step in education has not yet fully appeared in the public schools. The system of text

book instruction will not bring the greatest mental development to the pupils. There are those who maintain that the inductive method of instruction should begin with the youngest and extend to the most adult. When we put a man to studying chemistry or physics, we exhibit in the laboratory the practical workings of the laws of nature and teach him how to reason, from particulars to general principles, as the classics never can. There is much yet to be done to teach the people some truths. We are yet to change the system of education as it has existed for centuries. We must teach more discipline of mind and faculties, bringing control and the power of self-lifting-up, instead of making of our children mere poll parrots to repeat words by rote, whereby appeal is made to the memory rather than to powers of research and observation.

The Anglo-Saxon race is a Germanic one. In this great country, we see reunited the descendants of the Anglo-Saxon race and great bodies of descendants of the modern German races. We have the German with his philosophy, with his patience, and the Anglo-Saxon with his sturdiness. So we see, in the reuniting of the Germanic races, the march of progress.

I am proud to speak of the great expansion of the Anglo-Saxon race. We have seen the Anglo-

Saxons spread from little England across a great continent to the borders of Asia. I have an abiding faith in the triumph of the great Germanic races; I have faith in the expansion of our language; I have faith in the perpetuation of the principles of common law and in the usages of the great mercantile communities. Commerce is setting the pace formerly set by the missionaries, and in the wake of commerce follows civilization. As the Anglo-Saxon race expands, with its language, its laws and its mercantile usages, I look forward to the ultimate supremacy of the Germanic races; the ultimate supremacy of those Anglo-Saxons and Germans who have re-united to make the United States today, as shown by statistics, leader of the commerce of the world.

Much is yet to be done. The people of this country are just awakening to the necessities of commercial and industrial education; and when the people of the United States awaken to the absolute necessity of better opportunities for practical education fitting the needs of the great majority of the people, we will see these branches established, not only from the kindergarten and primary departments to the high schools, but colleges will establish everywhere not only mechanical engineering, mining engineering, and other engineering courses,

but departments of finance and commerce. When the people of the United States become aroused to the necessity of this kind of education and we see, from the kindergartens up to the universities, proper attention given to these subjects, there isn't any power on earth that can compete with the United States; and her supremacy will not only remain as it is today but will advance beyond even the fondest hopes of the most sanguine and optimistic American.

# Protection.

(Argument to a Jury on behalf of defendants in the United States Court at Cincinnati, Ohio, in the Diamond Cutters' contract labor cases, November 16, 1896.)

*May it please the Court and Gentlemen of the Jury—*

Begging your indulgence after a protracted trial, which has undoubtedly taxed your patience, I shall briefly present a few phases of these cases, hoping that what is said may assist in a solution of the questions presented.

From the discovery of this continent, it has been the boast that an asylum had been found for the oppressed of the world. The protection to life, labor and property, and freedom and equality guaranteed by our constitution, brought to us the skilled and thrifty of all countries. They and their descendants have by their diligence changed forests into fields of grain and into cities where great factories transform raw materials into finished products of trade, and thus have they created an industrial nation whose cereals and manufactures are the wonders of the world. But a recent and unusual influx of thriftless hordes from Asia and Europe, and the greed of a few great mine owners in filling the places of striking workmen by import-

ing, under contract, cheap, unskilled, foreign pauper labor, led the American public to believe that some restrictions should be placed on immigration. No demand ever went forth that all immigration should be stopped or that skilled workmen should be denied admission. That America had a surplus of brainworkers and skilled workmen has never been contended. The universal belief that the two evils mentioned should be remedied caused Congress to pass the Act of February 26, 1885, in language not altogether clear. An examination of the Congressional Records, the debates in Congress, the proceedings of labor organizations, the scholarly opinion of *Mr. Justice Peckham* in the *Laws Case,* of *Mr. Justice Brewer* in the *Church of Holy Trinity Case,* and of *Mr. Justice Brown* in the *Craig Case,* make it manifest that it was not the intention of Congress to exclude skilled labor and brainworkers, but to elevate the standard of immigration by encouraging the coming of these classes and excluding the cheap, unskilled labor of servile paupers.

Three questions are involved, Did the defendants make contracts for labor? Was diamond cutting a new industry not established at the time of passing this act? Could labor be otherwise obtained? They will be taken up in their order.

Did the defendants make contracts for labor? These cases charge that on the second day of May, 1895, defendants encouraged, by paying their expenses, the migration of William Lamberechts and Lewis DeGraff from Antwerp, Belgium, to Cincinnati, Ohio, and that they came under contract, made prior to the migration, to perform labor as diamond cutter and polisher respectively in the diamond cutting establishment of the defendants, known as The Coetermans-Henrichs-Keck Diamond Cutting Company. The elements thus charged are three: First, that defendants assisted the migration by paying the expenses from Antwerp to Cincinnati; second, that contracts were made by the defendants with William Lamberechts and Lewis DeGraff prior to the migration; third, that they migrated in pursuance thereof. These allegations have been denied by the defendants. Under a familiar and reasonable rule of law, the defendants are presumed to be innocent and are entitled to a verdict in their favor unless the plaintiff prove all the elements beyond a reasonable doubt.

If, for the sake of argument, we take the most favorable view of the evidence offered in support of the Government's cases, the facts appear as follows:

The Herman Keck Manufacturing Company was

organized in 1890 to manufacture jewelry. In March, 1895, Lewis DeGraff, William Lamberechts and other skilled diamond workers promised Mr. Van Reeth to come to America and perform service in Cincinnati for a period of two years at twenty-five and twenty dollars per week respectively. Mr. Van Reeth advanced money to pay their expenses from Antwerp to Cincinnati to be returned in weekly installments. There is no evidence that either Mr. Coetermans or Mr. Van Reeth, who were in Europe, or Mr. Keck who was in America, ever promised to employ them or keep them for two years, or pay them a fixed sum per week, or ever signed any paper. Mr. Van Reeth, William Lamberechts, Lewis DeGraff and the other diamond workers left Antwerp and reached New York March 20, 1895. Being detained at Ellis Island, they made affidavits that they came under contract with Keck & Co. and that Keck & Co. had advanced their expenses. At a subsequent hearing before the Court of Inquiry they denied having come under contract, and claimed to have paid their own expenses. They were nevertheless deported. Just as they were leaving, Herman Keck stated that he was going to Europe and would reach that place before they did. On reaching Europe they saw both Mr. Coetermans and Mr. Keck,

who told them they could come back if they wanted to. Nothing was said as to wages, or time of employment, but additional expense money was furnished and tickets supplied by Mr. Constant Van Reeth. On arriving at Cincinnati, they called on Mr. Keck at the office of The Herman Keck Manufacturing Company, and the next day went to work cutting and polishing diamonds at the place of business of The Coetermans-Henrichs-Keck Diamond Cutting Company. William Lamberechts was paid twenty-five dollars per week and Lewis DeGraff twenty dollars per week, and the weekly sums which they promised to repay were deducted. Mr. DeGraff took out his first citizenship papers, and at the end of two weeks expressed a desire to go to New York. Mr. Keck protested, but no efforts were made to prevent his leaving. Mr. Lamberechts left about the same time without any question being raised. On the eighth day of April, 1895, articles of incorporation were filed, and upon the fifteenth day of May, 1895, The Coetermans-Henrichs-Keck Diamond Cutting Company was legally organized.

Upon this state of facts there is no violation of the law. In the first place, there was no contract. The promises were wholly upon the part of William Lamberechts and Lewis DeGraff, and there were

no promises made to them. Neither Mr. Coetermans, Mr. Van Reeth, nor Mr. Keck promised to employ the men, to pay them wages, or to keep them for two years, and The Coetermans-Henrichs-Keck Diamond Cutting Company was not organized until May 15, 1895. If the acceptance of the tendered services on May 16, 1895, was the making of a counter promise, then a contract was made; but this was after the migration, and the statute does not prohibit a contract thus made. Let the learned counsel for the plaintiff answer these questions: Who made a promise? When did they make a promise? What promise did they make?

In the next place, these defendants did not pay the expenses of William Lamberechts and Lewis DeGraff. The testimony is, that the money was advanced to them and they promised to repay it and did repay part of the same as promised. It is a very different thing to pay a man's expenses, and to loan a man money to pay his own expenses.

But a more serious question presents itself. Will you visit heavy fines upon these defendants upon the testimony of such witnesses as the Government has introduced? They stand before you as self-confessed perjurors, willing to make any statement, no matter how false, to serve their own purposes. Their first affidavits were confessedly false,

in that they stated they were interpreted in their native language, in that they misstated the age of one of them and the salary of the other, although admonished by Mr. Van Reeth to tell the truth. They say that they testified falsely before the Court of Inquiry because they were told to. Lewis DeGraff says he committed perjury when he applied for naturalization papers, although in what respect he does not state, and how, it is impossible to understand. One attempts to excuse his false swearing and ease his conscience by saying that his hand was not upon the Holy Bible when he took his oath. They both confess that they broke their claimed agreements to perform labor, which yielded them fifty per centum more than their European wages. Neither has fully returned the money loaned him for his expenses. Both were paid for their time in giving their testimony in these cases at four dollars a day. Each expects a part of the blood money to be drawn from the defendants in the form of penalties. Both were exempted from arrest and deportation, although, if the position of the plaintiff be correct, both should have been deported to accomplish the purpose of this law.

Was diamond cutting a new industry not established at the time of passing this Act? The Act

of February 26, 1885, wisely provided that it should not be construed to apply to an industry not established at the date of its passage. Early in sacred and profane history mention is made of the use of diamonds for ornaments. They were used in the shape nature had formed them, and diamond cutting made no strides until the advant of Herman, an able artist, in 1407. He did much to produce a perfect cut and increase the play of light. In 1456, Lewis DeBerquem invented the method of cutting diamonds into regular facets. This is practically the beginning of the art of diamond cutting. His pupils spread to Amsterdam, Antwerp and Paris. In 1885, there were fifteen thousand diamond cutters in Amsterdam and the books say that Mr. Coster's establishment alone contains six hundred mills. These cities have heretofore prepared almost the entire output of cut diamonds for the markets of the world. According to the lowest estimate, America imported in the year 1885 about six million dollars' worth of cut stones, of which mellee constituted one-third in weight and one-half in value. Diamond cutting, which had once been in its infancy in Amsterdam and Antwerp, had grown to gigantic proportions in 1885, and ninety-nine per cent of the American diamond market was supplied from abroad. Diamond cut-

ting in America had its inception when Mr. Morse, of Boston, in 1867, set up two mills and was principally engaged in recutting. He educated a number of apprentices, who, from time to time, started small diamond cutting establishments with few mills and who spent part of their time in cutting rough and the rest in repair work. Mr. Cohenno, one of his pupils, did business as H. Cohenno, Cohenno & Hetch, Cohenno & Co., Keyser & Cohenno, and as The Netherlands-American Diamond Company. At no time were more than one thousand dollars invested, and the cutting amounted to seven and eight carats per week, and at other times to ten carats a month, but two and one-half carats a week. Then there was Isaac Hereman, a Prussian, who, with unusual zeal, made a small profit for a few years. Henry Ferz, an Austrian, who, as he has testified upon the witness stand, did chiefly repair work, and not cutting enough rough in a week to make up a single package, mixed his cut with imported goods. This reconciles the testimony of Cohenno and the many other witnesses called by the Government, who had seen packages of cut at Ferz's store. Few or no American-cut diamonds were put upon the market as such, and, being so insignificant in value and quantity were swallowed up in foreign goods, sold by the brokers

and importers. The numerous importers and wholesale and retail dealers, who have testified, never knew of a package of American cut diamonds being offered for sale until the year 1888 and then in a very small way. Mr. Harvey Galbreath, of the celebrated house of Duhme & Co., a man of extensive European and American business experience, has told you so with such fairness and frankness that the learned counsel for the Government abandoned their usual tactics in cross-examination. If the entire consumption of diamonds in the United States in 1885 were six millions of dollars and the American-cut were five per centum, it would have amounted to but $300,000. Mr. George Kuntz, a high authority on precious stones, puts it at but one per centum. At the highest estimate the American-cut would not have been half enough to supply the regular business of the one house of Fox Brothers in the City of Cincinnati. Then it is to be remembered that Cincinnati is not all of the United States, and that Fox Brothers are not all of Cincinnati, because there are Duhme, Herschede, Plaut, Oskamp, Hellebusch, Oskamp, Nolting & Co., Flint, Hummel, Davidson, Mithoefer, Michie Brothers, and others without paying any attention to the little town of New York, the village of Chicago, and the hamlets of Boston and

St. Louis. And then we have heard that the United States contained cities whose names sounded something like San Francisco, Columbus, Indianapolis, Philadelphia, Baltimore, New Orleans, St. Paul, Minneapolis, Kansas City, Denver, Chattanooga, Memphis, Nashville, Atlanta, Richmond, Detroit, Cleveland, Toledo and Buffalo, and it has been said that diamonds are sold in all these places. Still, they tell us that diamond cutting was an established industry with less than one hundred cleavers, cutters, polishers and setters all told, when the contract labor law was passed. Mr. John C. Mont alone sold nearly $1,000,000 worth of diamonds a year. He imported but 10,000 carats of rough in five years, which is but 2,000 carats a year, or 800 carats of finished goods. Taking these at an average of $50 per carat, their value would amount to $40,000 or less than five per cent of his sales, being $40,000 cut to $960,000 imported.

While many witnesses have been called on behalf of plaintiffs to tell you that Jiles had two mills in Chicago, what Morse, Cohenno, and one or two others did in Boston and Roxbury, what Hereman, Levy, Randall, Baremere and Billings, Mendes and Ramsgate did in New York, there is a universal agreement that mellee was not cut as a regular business. Very few shops cleaved any diamonds,

but bought what were called "close stones" which left no cleavings. There were some cleavings in the very few cases testified to, but it did not pay to cut them into mellee; they were reshipped to Europe for that purpose.

The establishment of the Coetermans-Henrichs-Keck Diamond Cutting Company was equipped from the beginning for the cutting of diamonds in all its branches. Cleavers, cutters, setters and polishers were engaged, all competent not only to cut and polish the larger stones but to convert cleavings and small rough into mellee. Hon. Henry H. Schulte, the Surveyor of the Port and Appraiser of Customs, says that, from the beginning, packages came containing stones ranging in single packages from less than one-half a carat to ten carats. The average weight brought out on cross-examination did not make two carats, which goes to show that there was a very large quantity of small stuff, especially when we remember that a one-carat stone in the rough makes but four-tenths of a carat when cut. A man may have one hundred pennies and a dollar bill in his pocket, and the average face value of his money would be almost two cents. This argument of average avails the plaintiff nothing. Mr. Schulte further testified that there were from the beginning pack-

ages of rough mellee. The foreman of The Herman Keck Manufacturing Company visited the cutting establishment of The Coetermans-Henrichs-Keck Diamond Cutting Company daily, and saw Lamberechts and DeGraff cutting mellee and Mr. Van Reeth cleaving large stones. He carried away daily the finished products to supply the purchases made by The Herman Keck Manufacturing Co. Was any business of that kind and character conducted in America in 1885? May we not say with just pride that the Coetermans-Henrichs-Keck Diamond Cutting Company was the first pioneer in America of a complete diamond cutting establishment, where the art was carried on from its beginning to its conclusion; cleaving, cutting, setting and polishing, of not only the larger stones but of mellee; not only of mellee from mellee rough but from cleavings? Is it the intention of the law to visit upon these men a penalty because they have shown the same enterprising spirit of Morse, and because under the new conditions the defendants have turned into a prosperous and profitable industry what Morse started as an experiment?

With the inception of the American Government, at the first meeting of the first Congress after the adoption of the constitution and upon the first anniversary of the Declaration of Independence,

after the formation of the more perfect Union to insure domestic tranquility, provide for the common defense and promote the general welfare, and to secure the blessings of liberty, Congress passed its first tariff law, wherein it recited that it was, among other things for the encouragement and protection of manufacturers. This declaration has become the settled policy of the American people, no matter to which political party our destinies have been committed. It is conceded by almost every witness that the struggling infant industry of diamond cutting needed fostering and protecting, and it was but natural, when the great champion of protection was chairman of the Ways and Means Committee, that the struggling diamond cutters, who had been and were experimenting should knock at the door of his committee room. Protection did not come then, but it did with the Wilson-Gorman bill. With the changed conditions, the importer and broker of Maiden Lane fell, and there arose in their places the promoters of an American industry of diamond cutting, which, when once put upon a stable basis, promises to take rank with the tin plate, pottery, steel rail, woolen, cotton goods and carriage industries of the United States. Importations of foreign cut goods fell off, and the American cutters, instead of

mixing a few American cut diamonds in the packages of imported goods, began for the first time to the knowledge of the wholesale and retail dealers to supply packages of American cut diamonds. Foreign shops were closed; European gold came to America; skilled workmen sought homes on Freedom's soil. There was more diamond cutting in America than had ever been dreamed of. No aliens took the places of the diamond cutters already here, most of whom were foreigners, but went into the great establishments, such as Stearns, Kryn & Waters, and the other large places which were erected in New York, Brooklyn, New Jersey and the West. Thus, with the general belief of manufacturers in the wisdom of protection, diamond cutting has outgrown its infant state, and gradually reached the status of an established industry. What protection do workmen in America need? Is not freedom to contract, steady work and remunerative wages all the protection that American manhood requires?

It is contended by the learned counsel for the Government that they should succeed because defendants were dragging down American wages. It was conceded by all the witnesses that because mellee as a rule were smaller and cheaper stones it did not require such high priced or as skilled work-

men. It is asserted that with the influx of foreign workmen who cut only large stones that the price of wages has fallen twenty per centum. It is true, that two witnesses said they had seen it figured that wages had fallen off forty per centum but they both frankly confessed that in their own shops they reduced the wages but twenty per centum. But what does this argue for the Government case? According to the statement made in the petitions, William Lamberechts was to have received twenty-five dollars per week and Lewis DeGraff twenty dollars per week, both of them mellee cutters and polishers. Were not these the wages of honest men? Were these not fifty per centum higher than they received in Europe? Was it humane to pay them these wages? Ought they to have been paid still higher wages? Every one knows that it is cheaper by fifty per centum to live in Cincinnati than in New York. Mr. Cohenno, whose name has been paraded upon the cross-examination of every witness called for the defendants, testified when asked a question by putting one and answering it himself as follows:

"Do you consider it a business for a mechanic to make about $10.00 or $12.00 or $15.00 a week as a diamond cutter? Where I used to pay $2.50 per carat to polishers now they only get $1.25. I con-

sider that a mechanic shall make about $25.00 per week to be an honest man in the trade, because if men handle about $500.00 worth of diamonds and only make about $10.00 or $12.00 a week, that is sufficient profit for the employer and for the manufacturers themselves."

It therefore appears that Mr. Lamberechts, living in Cincinnati in dull times was getting the full prices of a New York workman in prosperous times and that Mr. DeGraff was getting within twenty per centum thereof. It is not to be forgotten that in almost every manufacturing establishment in the United States, there have been cuts of more than 25 per centum in wages during the last three years of depression in business.

The little handful of American cutters ought to be willing to suffer a temporary cut of 20 per centum during these times of depression, and the transition stage in the diamond business, in order to help establish a great industry, with its promise of extended commerce, steady employment and honest wages. Twenty or twenty-five dollars per week are good wages for skilled workmen and it is rare that a skilled workman in any of the lines of industries pursued in Cincinnati get more than fifteen dollars per week. Could labor be otherwise obtained? It is asserted that defendants could

have procured home labor. It is very clear from the evidence that all of the diamond cutters in America were not more than sufficient to supply American factories existing in 1892. In March, 1895, there were not sufficient men in all America to furnish a single shop, having sixty mills. The manufacturers at Newark even offered money to entice men to come.

Much testimony has been introduced to show that there were American apprentices. We are ready to join in the highest praise to Mr. Henry D. Morse of Boston, who, both in that city and in the suburb at Roxbury, made noble, persistent and successful efforts to educate a few American apprentices. But why does not the plaintiff produce upon the stand an American apprentice to substantiate its cause, having ransacked the history of diamond cutting and every available worker for a period of twenty-eight years? With all the noisy declamations as to American apprentices, why is it, that with one or two exceptions, every witness produced by the plaintiff has been a person foreign born, who has sought an asylum in America and who is now attempting to place a stigma upon American factories and a stain upon American citizens?

No one can out-do us in our desire and zeal for

the enforcement of law and the maintenance of order. No one can excel us in giving praise to any government official who zealously endeavors to carry out a statute. But this law is peculiar, and, as the committee of Congress reporting it said, badly drawn. When an informer steps in, the United States District Attorney must bring a suit. I believe in the American Government, and believe it can do no wrong, but Government officers have in time past been overzealous; government officers, at the dictate of informers, and under unwise provisions of law, have instituted and pressed for convictions under the statute. Such cases are unfortunate, at least, and have tended to bring discredit upon laws wise in their spirit, but subject to the greatest abuses in their enforcement. Why, let us ask, was the suit brought against Holy Trinity Church, of New York, for engaging the services of an Englishman to spread the Gospel in America? Why was a suit pressed against Mr. John Law, of this city, for securing the services of a French chemist, to develop the sugar industry in Louisiana? Why were those suits pressed for conviction through court after court to the Supreme Court of the United States? Why have these defendants in these cases now on trial been oppressed with litigation, after having expended

thousands of dollars in attempting to put American diamond cutting upon the basis of one of the established industries of the United States? It almost makes one think that an informer lurks at the bottom of these suits, which can be begun at his dictation, in the name of the great government of the United States, without cost or expense to him. The informer reaps the usufruct, while the government furnishes him the services of a special attorney of the Immigration Department, and the United States District Attorney, and if he reach the Supreme Court of the United States, the services of the Attorney General and Solicitor General of the United States. Court costs and expenses of printing records and briefs come out of the treasury of the United States, which we are all taxed to fill.

The learned counsel for the government have attempted to paint the defendants in very black colors. It is hard to believe that Mr. Herman Keck is a bad man when he contributed to the comfort of these men when cooped up at Ellis Island, and restored to Mr. DeGraff wages which had been properly deducted by the foreman on account of illness. Every word and line of testimony show Mr. Herman Keck to be a generous soul, a tender-hearted employer and a champion of honest wages.

Now, gentlemen of the jury, in conclusion, do you think a stigma should be placed upon the defendants who have spent their fortunes to establish a great industry?

Do not send these defendants among their business associates branded as violaters of law and with their heads bowed in shame, but send them forth in triumph as victors emerging from a mistaken prosecution. Let them go, and devote the money which the informer seeks to wring from them, in building up an enterprise which will be a credit to themselves, their families, their city, their state and to the people of the United States of America.*

*The jury returned a verdict of not guilty.

# Commercial Aspect of Uniform State Laws.

(An address delivered before The Cincinnati Credit Men's Association at The Business Men's Club, Tuesday evening, February 19, 1907.)

*Mr. President and Gentlemen—*

At the close of the American Revolution and even after the adoption of the articles of Confederation, each American State was not only a political unit but an industrial and commercial unit. Means of communication were few and cost of transportation almost prohibitive except in border and coast cities. Each state not only determined its political future but its own industrial and commercial policy. The Constitution of the United States, adopted in 1789, recognized the fact that each state continued as a political unit and at the same time created another political unit, the nation at large. It also recognized in part the Union as one commercial unit and each State as a separate commercial unit. On the limited subjects of foreign commerce, bankruptcy, coinage, patents and copyrights, exclusive jurisdiction was vested in Congress to legislate for the entire nation. On the great and important sub-

ject of commerce it divided authority by vesting in Congress power to regulate interstate commerce and left each state to regulate its own commerce. By leaving to each state power to regulate all production and its own commerce, it limited the power of Congress by restricting that body to the regulation of interstate commerce. Therefore, there grew up a separate body of laws in each state of the American Union. An unfortunate (and by many now believed, erroneous) decision by the Supreme Court of the United States in 1869, in the insurance cases, that a contract between citizens of different states did not constitute interstate commerce checked the growth of that unity of law so convenient to the development of industries national in character. While these constitutional provisions tended to localize industry and commerce, the invention of new means of transportation by steam and rail and new methods of communication by telephone and telegraph caused commerce to override state lines and to make that economically national which was legally local. In other words, that which by law is the commerce of each of the forty-five states of the American Union became in fact commerce national in character. It was the failure of our forefathers to foresee that some day the states would become one country for commercial pur-

poses that resulted in vesting in Congress the power to regulate only interstate commerce instead of vesting in that body power to regulate all commerce.

For one hundred years, from 1789 when the Constitution was adopted, to 1890 no practical remedy was presented to free commercial intercourse from the inconvenience of a distinct law for each state. There was no central body having power to mold into one law—into one unit—commercial usages and give to them a legal sanction so as to produce one rule for all commercial transactions through the entire country. In 1890 the state of New York suggested a remedy by creating a commission on uniform state laws and inviting the Governor of each state to appoint commissioners to a national conference. The first meeting of the Commissioners on Uniform State Laws was held in 1892 and the year 1906 marked the sixteenth annual conference.

That body had presented to it three questions to solve:

Did commerce suffer from the existing manner of expressing the law merchant?

Would codification afford a remedy?

How could uniformity be brought about?

That commerce did suffer from the present

method of expressing the law merchant seems obvious. The law of England was founded on the decisions of her courts except as modified by statutes. The law of each state of the American Union was likewise made up of the decisions and statutes of each state, resulting in as many common laws and statute laws as there were separate commonwealths.

To the merchant there are four essentials to the law: it should be certain, quickly and economically ascertained, and uniform throughout the commercial world.

A person about to acquire a bond, promissory note, draft, certificate of stock, bill of lading or warehouse receipt ought to know with certainty the law governing the transaction. Under the prevailing system, if a case had not been decided in the state where the commercial paper was issued, there was no means of knowing with certainty its legal effect. If the instrument were issued in Ohio and a lawyer consulted, he would say that by the decisions in Massachusetts the transaction is valid; by those of New York it is invalid and he could not tell which view, if either, the courts of Ohio would adopt. Or, if the courts in Ohio had decided that the transfer of the commercial paper was valid and the Supreme Court of the United States had de-

clared it invalid, the lawyer must tell his client that if by chance the transaction should be litigated in the state courts of Ohio he will win, but if in the United States court he will lose. If the merchant had taken no legal advice before negotiating for the commercial paper, he might or might not have a remedy, depending on the accident as to whether the matter was litigated in the state court or Federal court—the judges of each professing, under their oaths of office, to administer the law of Ohio and not the law of the United States.

To this great uncertainty is added infinite delay, as the tradesman of today knows not time or space and has become accustomed to the shorthand writer, electric car, the limited express, the telegraph and the long distance telephone. His opportunities for trade are gone if he waits days and weeks for a lawyer to go through multitudes of reports, digests, abridgments and encyclopedias and ill-digested statutes. The merchant must have an answer at once, otherwise his opportunity for business is gone.

Law should be furnished. economically. The present method of ascertaining the law, is for the lawyer or judge to ascertain a legal principle by induction from the decided cases, which cases he has found by laborious research. Each time a case

is litigated, the litigant pays court costs and lawyers' fees and thus the individual bears the expense of giving law to the state when the state should at its own expense furnish law to all the people. It is a great evil that the few individuals are put to the expense of establishing a principle of law for the community, which principle is liable to be overthrown in the next case decided even in the same court. In theory, law is made by the state; in practice, it is made by the litigant and the cost of law making, instead of being borne by all the people is defrayed by the few. Because the whole country is a unit for commercial purposes, and there are forty-five units for political purposes, it is a great hardship that a merchant about to deal with a piece of commercial paper must take great chances or go to the expense and suffer the delay of finding out with any degree of certainty the laws of the state where the paper is issued. For commercial purposes there should be one rule clearly expressed governing all commercial transactions. Considering the limited power vested in Congress and the powers reserved to the states, a national commercial code is impossible, no matter how desirable. Although Congress may regulate interstate commerce, this power is so limited in its

nature that a national law would cover but a limited number of commerical transactions.

Will codification afford a remedy? Codification consists in reducing the whole body of law, or the whole body of law upon a particular subject, into a definite and comprehensive statement. The stock argument against codification is that it makes the law too rigid and may sometimes work injustice in hard, exceptional cases. This argument, however, is fallacious, because every practitioner knows that when hard cases arise the law books are ransacked from the time of the Norman Conquest and the court blindly applies any obsolete precedent that may have been found by diligent counsel.

The greatest merit of codification is that it produces a higher degree of certainty than the present manner of stating the law. It reduces the entire law upon a particular subject to a set of definite rules, thus furnishing in advance the principle to be followed in cases thereafter arising, and prevents litigation. As was well said by Judge Chalmers, of London, England, in an address delivered before the American Bar Association, August 27, 1902, "The object of the man of business is not to get a scientific decision—but to avoid litigation."

Mr. R. Floyd Clarke, of the New York Bar,

in the most learned and elaborate argument yet brought out against codification, concedes that the commercial law ought to be codified.

Sir Frederick Pollock well said: "It (codification) ought at any rate to make the substance and reason of law more comprehensive to men of business who are not lawyers. It is not to be supposed that difficult cases can be abolished or to any great extent made less difficult by * * any * * codifying measure. But since difficult cases are, after all, the minority, perhaps it is of some importance to men of business to be enabled to see for themselves the principles applicable to easy ones. * * * Codes are not meant to dispense with lawyers being learned, but for the ease of the lay people and the greater usefulness of the law."

The question is not one of entirely avoiding evils, but of reducing them to a minimum. Laws are just as necessary as convenient guides to conduct in carrying on the business of the world as rules are necessary in conducting any large private enterprise. Whatever may be said of the advantages or disadvantages of the present manner of stating the law or the good or bad resulting from codification of the law, the absolute necessity for uniformity of commercial law in the United States is apparent. Uniformity of law cannot be brought

about under the Constitution of the United States by an act of Congress because of the limited powers of that body as construed by the Supreme Court of the United States. The only practical remedy is to prepare a code which shall be declaratory of the law as presented in the best reasoned precedents and in the accepted customs of the commercial world. Let such a code be prepared on each branch of the commercial law and let such codes be passed in the same identical form by the Legislature of each state. Thus can uniformity in the laws of the various states be brought about without amending the constitution of the United States or changing the political relations of one state to another or offending the sensibilities of the most radical advocates of state's rights or of the strictest constructionist of the Federal Constitution. Every business man will at a glance see the benefit of codification of law, because by this means alone, can uniformity be brought about.

How can uniformity be brought about? In the first place a person called upon to prepare a code should make it declaratory rather than amendatory of the law. Where, however, the decisions of the courts and the existing rules of statutory law are manifestly wrong, where they have been outgrown by new mercantile customs and usages, where the

economic principles upon which such decisions and statutes were originally based have disappeared, where new industrial, commercial, economic and social conditions have arisen, conservative amendments should be proposed, but no extreme radical reforms advocated. A code should be confined to a statement of the general principles of the law with the well defined exception. Although it should be expressed briefly, yet it should cover those transactions which experience has demonstrated most frequently arise in practice. It should end with a clause stating that cases not covered by the code should be governed by the principles of law and equity, including the law merchant and the commercially accepted customs of merchants. All the continental nations and Turkey and Japan have codified their commercial law and the successful codification of branches of the English and American law is no longer an experiment.

In 1878 Mr. W. D. Chalmers, an English barrister (afterwards Judge Chalmers) published a Digest of the Law of Bills of Exchange, Promissory Notes and Checks, and a few years thereafter read a paper before the English Institute of Bankers, advocating the codification of the law governing these classes of commercial paper. The Associated Chambers of Commerce of England,

including the Institute of Bankers, directed him to prepare a code which was introduced in the House of Commons by Sir John Lubbock. That body referred it to a select committee with Sir Farrer Herschel (afterwards Lord Chancellor Herschel) as Chairman. After being favorably reported, it passed the House, was sent to the Lords and there referred to a committee of which Lord Bramwell was chairman. This committee inserted a few amendments and reported it to the House of Lords, which passed it, and the amendments being agreed to by the House of Commons, the bill received the Royal assent on the eighteenth day of August, 1882. Since that time it has been adopted in more than forty of the English colonies and dependencies and thus a uniform law of negotiable instruments exists through Great Britain and her principal colonies.

Sir Frederick Pollock reduced the law of partnership to a code and this was adopted by the English Parliament in 1890. Mr. Chalmers then reduced the law of sales to a code and this likewise was adopted by the English Parliament in 1893.

While the English Parliament has enacted some other statutes bearing upon other branches of commercial law, it may be said that England has

codified but three branches of the law, namely, the law of bills, notes and checks, the law of partnership and the law of sales. So that for thirteen years England has taken no further steps towards codifying her law merchant.

In 1894 the Commissioners on Uniform State Laws in national conference instructed its committee on commercial law to prepare a codification of the law of bills, notes and checks. This work was committed to Mr. John J. Crawford, (a former Cincinnati boy) then a member of the New York Bar. It was printed with copious annotations, sent to each member of the conference, prominent lawyers, law professors and American and English Judges with an invitation for suggestions and criticisms and submitted to the Conference in 1895, discussed section by section, amended and adopted. It received the strong indorsement of the American Bankers' Association and many State Bankers' Associations, including the Ohio State Bankers' Association, and many commercial bodies. It has now been adopted in twenty-eight states, by Congress for the District of Columbia, and by the territory of Arizona. This code was an admirable example of its kind and the best piece of codification of the commercial law in any English speaking nation. It

is recognized as superior to the English code on the same subject. Notwithstanding its apparent perfection, it has been subjected to criticism, some of which was merited. At the same time, it has been a splendid lesson for the future that no proposed code should be adopted until it has been thoroughly discussed and considered by the commercial bodies of the country to determine whether it embodies existing usages and customs of the merchants. It serves as an admonition that in the adoption of all future codes, they should not be indorsed by the commissioners until a reasonable time after their preparation.

The commissioners took no further steps toward the codification of the commercial law until 1902 when they employed Professor Samuel Williston of the Harvard Law School to codify the law of sales. This code was submitted to the Commissioners in 1903, discussed at that meeting and action thereon postponed for another year. In the meantime it was distributed throughout the country for criticism and suggestions. It was again discussed at the meetings of 1904 and 1905 and again put off for adoption until the meeting of 1906. It was again discussed at the meeting of 1906 and adopted and recommended to the legislatures of the various states for enactment into

law. The general assemblies of about thirty-eight states are now in session and it will be introduced into each of these for consideration.

In 1904 the Commissioners on Uniform State Laws employed Professor Samuel Williston and Mr. Barry Mohun, of Washington, D. C., to codify the law of warehouse receipts. This was submitted to the commissioners at their meeting in 1905 and very fully discussed and action thereon postponed until 1906. In 1906 the committee on commercial law of that body spent three days in discussing its provisions and it was then submitted to the full Conference which spent three full days in its discussion and by the unanimous vote of all the states represented at the Conference it was recommended to the various states. It likewise will be introduced into the legislatures of about thirty-eight states at their sessions now being held.

In 1902 Professor James Barr Ames, Dean of the Harvard Law School, volunteered his services to codify the law of partnership. He did not submit his draft until the meeting of 1906 and its discussion has been postponed until the meeting of 1907. In 1905 the Commissioners on Uniform State Laws employed Professor Williston to codify the law of bills of lading and this

was submitted at the annual session of 1906 and action thereon postponed for another year. It is the intention of the Committee on Commercial Law to hold a session in New York in the Spring for the purpose of inviting a general discussion on this most important subject of bills of lading. The American Bankers' Association has prepared a bill on the subject of bills of lading to be issued in interstate commerce transactions. While this bill is an excellent measure, its errors are of omission rather than of commission. It is probable that Congress has power to legislate on the subject of bills of lading used in interstate commerce. Be this as it may, it is still important that there should be uniform state legislation on this most important subject.

At the meeting of 1906 the commissioners employed Professor Samuel Williston to codify the law governing certificates of stock and his report will be submitted at the meeting of 1907.

When the Commissioners add to their codes on bills, notes and checks and on warehouse receipts, codes on bills of lading and certificates of stock, they will have rounded out the whole subject of negotiable documents of title and commercial paper which are recognized as most important instrumentalities in giving mobility to credit.

Although Congress would have power to legislate on bills of lading used in interstate commerce, it has absolutely no power to legislate on bills of lading not so used and has no power to legislate upon the important subjects of bills, notes, checks, warehouse receipts, certificates of stocks, partnerships and sales and the numerous other important subjects which the Conference of Commissioners in time will take up for the purpose of codification.

From time immemorial a conflict has been going on between the technical legal view of many questions and the commercial or economic views thereof. Many courts of many jurisdictions have slavishly adhered to technical rules having their origin in obsolete industrial, commercial, economic and social conditions. Other courts and other judges at other times have believed in overthrowing the obsolete precedents and substituting in their place rules which were a recognition of existing commercial usages and customs, and resting upon present economic, commercial, industrial and social conditions. This conflict finds its place in the recorded decisions of the courts and the engrossed laws of legislative halls.

Foreign drafts at first were the only form of commercial paper recognized by the courts. Domestic bills of exchange then received judicial

recognition. As late as 1702 Lord Justice Holt indignantly declared from the bench that promissory notes were not negotiable and that the merchants of Lombard street were trying to make laws for Westminster Hall. Lombard street did make law for Westminster Hall because the merchants immediately petitioned the English parliament, and the English Parliament overthrew the dictum of Lord Holt.

Bank notes, iron warrants, warehouse receipts and bills of lading, though recognized throughout the commercial world as instruments of credit, were slow in finding judicial recognition. It has been necessary for the merchants to appeal to the legislatures of the various states to give this class of commercial paper any standing, and as fast as the legislative bodies have declared them negotiable the courts have been restricting their negotiable character by straight jacket decisions built upon commercial conditions which no longer exist.

This same conflict has, at times, appeared to a limited extent, in the debates of the Commissioners on Uniform State Laws at their national conferences, but after argument the commercial, rather than the legal, view has been universally adopted. And why not? The merchants gave to

the law their customs and usages and now that our legislative bodies are to give to the merchants codes of mercantile law, these codes should, so far as possible, embody these commercial usages freed from legal jargon and unencumbered by mere legal rules, except such as are based upon ethical principles underlying all American Jurisprudence and principles of economics underlying sane and sound commerce.

The principles of the law merchant are clearly recognized in the Negotiable Instruments Code governing bills, notes and checks, which declares: "In any case not provided for in this act the rules of the law merchant shall govern."

In the proposed code governing the Law of Sales it is provided: "In any case not provided for in this act, the rules of law and equity, including the law merchant, * * * shall continue to apply."

In the Warehouse Receipts Act: "In any case not provided for in this act, the rules of law and equity, including the law merchant, * * * shall govern."

The proposed Bills of Lading Code: "In any case not provided for in this act, the rules of the common law, including the law merchant * * * shall apply." There is no doubt that the next ses-

sion of the conference of Commissioners of Uniform State Laws, when that body comes to recommend the Bills of Lading Code to the legislatures, will recommend that this section be made to exactly conform to the Sales Code and the Warehouse Receipts Code. In the first draft of the partnership act, it is stated that: "The rules of equity and common law applicable to partnership shall continue in force except so far as they are inconsistent with the express provisions of this act." There is no doubt but that the Conference, before recommending the partnership act to the legislatures, will amend this section to conform to the sales act and the warehouse receipts act.

A legal battle has been waged for centuries as to whether the commercial or the legal view of a partnership should be adopted by the courts. Most of the courts have adopted the purely technical legal view, but a few have adopted the commercial view. Professor Ames, in drafting the partnership code, has recognized the commercial view by providing that: "A partnership is a legal person formed by the association of two or more individuals for the purpose of carrying on business with a view to profit."

There has likewise been a conflict between the legal view and commercial view as to what con-

stitutes valuable consideration. The Commissioners on Uniform Laws have accepted the commercial view. In the Negotiable Instruments Act it is expressly provided that, "Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value." The Sales Code provides that, "Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing claim whether for money or not, constitutes value where goods or documents of title are taken either in satisfaction thereof or as security therefor." The Warehouse Receipts Code provides that, "Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing obligation, whether for money or not, constitutes value where a receipt is taken either in satisfaction thereof, or as security therefor." The proposed Bills of Lading Code provides that, "Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing obligation, whether for money or not, constitutes value where the receipt is taken either in satisfaction thereof, or as security therefor."

The negotiable character of documents of title including warehouse receipts and bills of lading, is clearly recognized by the sales code, warehouse

receipt code and bills of lading code, which declare that when made to order they shall be negotiable. This is the mercantile view.

Thus the Commissioners on Uniform State Laws have formulated codes which, when adopted in the various states, will make the law merchant uniform throughout the United States. The Commissioners have disregarded mere technical quibbels and substituted for obsolete rules of law the existing and living customs and usages of the commercial world. One of the objects of your organization is: "To assist in establishing uniformity in business customs and laws." The Commissioners are carrying out one of the objects for which you were organized because they are embodying within the codes not only rules of law sanctioned by courts which have some conception of the industrial and commercial problems, but also customs and usages of merchants which have not yet found their places in judicial decisions.

Credit is one of the mightiest forces of commerce in the distribution of products both agricultural and manufactured. It has become the great medium of exchange. The economic or commercial view of credit and the legal view are to some extent divergent. They must be brought

into closer harmony. While the legal side of credit deals largely with the forms and sanctions of law, these forms and legal sanctions ought to be based on modern economic and commercial conditions rather than former and more or less obsolete economic and commercial conditions. It may be that the subject of credit is capable of codification. While organizations of lawyers have played an important part in framing codes and helping to bring about uniformity of laws, the commercial bodies have been even more important factors in this work. It was the Associated Chambers of Commerce and Institute of Bankers that fathered the movement in England. It was the American Bankers' Association which exerted a most potent influence in securing the enactment of the negotiable instruments law. It was the American Warehouse-men's Association which contributed $1,500 to the Commissioners on Uniform State Laws to enable that body to carry on its work by employing experts to codify the law of warehouse receipts. It is for the commercial bodies to support the Commissioners on Uniform State Laws in securing the enactment of the codes on sales, warehouse receipts, bills of lading, certificates of stock and partnerships.

If the commercial theory of credit can be

brought into closer harmony with the legal view, might it not be wise for the National Credit Men's Association to take up with the Commissioners on Uniform State Laws the question of codifying the law bearing upon credit and thereby bring about uniformity of law on this very important subject throughout the United States?